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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The public revelation of a federal grand jury investigation into business conduct routinely triggers follow-on class actions, and the grand jury investigation and ensuing civil actions often proceed concurrently. In the civil actions, district judges frequently issue protective orders to secure important interests, such as the confidentiality of competitively sensitive business information disclosed in discovery. When federal prosecutors serve grand jury subpoenas for such protected discovery materials, the courts must decide whether the grand jury subpoena overrides the civil protective order.

Here, the Ninth Circuit applied that circuit's "*per se* rule" that a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations such as the territorial limitations on a grand jury's subpoena power. In stark contrast to the Ninth Circuit's "*per se* rule," the governing rule in the Second Circuit presumes that a civil protective order trumps a grand jury subpoena, absent certain exceptional circumstances. These irreconcilable rules bookend an express, three-way conflict among six circuits on this important question of federal practice. The question presented is as follows:

Whether a grand jury subpoena always trumps a civil protective order, thus allowing prosecutors to obtain discovery materials from a parallel civil action, regardless of any countervailing considerations.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is the subject of this petition are as follows:

Petitioner in this Court, appellee below, is White & Case LLP. Additional appellees below who are not parties to this petition include Nossaman LLP and K&L Gates LLP.

Respondent in this Court, appellant below, is the United States of America.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner states as follows:

White & Case LLP, a law firm, has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Toshiba Corporation ("Toshiba"), Toshiba Mobile Display Co., Ltd. ("TMD") (f/k/a Toshiba Matsushita Display Technology Co., Ltd.), Toshiba America Electronic Components, Inc. ("TAEC"), and Toshiba America Information Systems, Inc. ("TAIS"), the real parties in interest, hereby state as follows: Toshiba has no parent company, and no publicly held corporation owns 10 percent or more of its stock. TMD is a wholly-owned subsidiary of Toshiba. TAEC and TAIS are wholly-owned subsidiaries of Toshiba America, Inc., which is a holding company wholly owned by Toshiba.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner White & Case LLP respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 627 F.3d 1143 (9th Cir. 2010). The order of the court of appeals issuing the mandate (Sealed App. 1) is not reported.

The opinion of the district court quashing the grand jury subpoenas (Sealed App. 2) was filed under seal and is not reported.

The district court issued an unsealed "Statement of Reasoning" explaining its decision quashing the grand jury subpoenas (App. 4a). The Statement of Reasoning is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 26(c)(1) of the Federal Rules of Civil Procedure provides in relevant part:

> A party or any person from whom discovery is sought may move for a protective order . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue

> burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way . . . .

Rule 17(c)(2) of the Federal Rules of Criminal Procedure provides: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

STATEMENT OF THE CASE

This petition concerns a recurring issue of critical importance: whether a grand jury subpoena trumps a civil protective order regardless of any countervailing considerations, thus permitting federal prosecutors to obtain discovery produced in a parallel civil action under all circumstances. The courts of appeals are divided on this issue.

1. Rule 26(c)(1) of the Federal Rules of Civil Procedure provides district courts with broad

discretion, upon a finding of good cause, to enter protective orders limiting the timing, use and dissemination of discovery. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."). Protective orders serve various important functions, including preserving the confidentiality of trade secrets or sensitive commercial information. Fed. R. Civ. P. 26(c)(1)(G). Protective orders are essential in "secur[ing] the just, speedy, and inexpensive determination" of civil actions by encouraging full disclosure of relevant evidence. *See* Fed. R. Civ. P. 1. For example, in *Seattle Times*, this Court held that a protective order was enforceable and consistent with the First Amendment, even though the protective order restricted the press's ability to use the fruits of pretrial civil discovery. 467 U.S. at 37 (1984).

The discretion of district courts to enter protective orders is necessary because civil discovery under the Federal Rules is exceptionally broad. *See id.* at 34 ("Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."). Discovery in antitrust cases, for example, is infamously intrusive. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting the "enormous expense of discovery in" antitrust cases) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

2. "The grand jury occupies a unique role in our criminal justice system. . . . As a necessary consequence of its investigatory function, the grand

jury paints with a broad brush." *United States v. R. Enters.*, 498 U.S. 292, 297 (1991). "The investigatory powers of the grand jury are nevertheless not unlimited." *Id.* at 299. Rule 17(c)(2) of the Federal Rules of Criminal Procedure vests district judges with discretion to determine the enforceability of grand jury subpoenas: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

Addressing this standard under Rule 17(c)(2), this Court held in *R. Enterprises*: "This standard is not self-explanatory. As we have observed, what is reasonable depends on the context." 498 U.S. at 299 (1991) (citation and internal quotation marks omitted). Thus, this Court has confirmed what the text of Rule 17(c)(2) naturally suggests: a motion to quash under Rule 17(c)(2) requires a fact-intensive, circumstantial inquiry by the district judge.

3. In December 2006, news reports revealed a criminal grand jury investigation being conducted by the United States Department of Justice, Antitrust Division ("DOJ"), into the thin-film transistor, liquid crystal display ("TFT-LCD") industry. App. 2a. As is typical upon the revelation of a grand jury investigation into antitrust, securities and other business conduct, the class-action bar filed dozens of putative class actions within a matter of days. App. 2a. Eventually, close to 140 such putative class action complaints (the "Class Actions") were filed around the country, seeking treble damages, attorneys' fees and injunctive relief under the Clayton Act. 15 U.S.C. §§ 15, 26 (2011).

As the district court observed: "It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation . . . ." App. 8a; *see also* Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 58 (Summer 2010) (in a survey of 1,811 antitrust class actions filed between January 1, 2007 and December 31, 2009, nearly 60% arose from prior government enforcement action). Indeed, here DOJ conceded that its grand jury investigation caused the Class Actions. *See* United States' Notice of Mot. and Mot. to Modify the Court's Sept. 25, 2007 Order Granting United States' Mot. to Stay Discovery at 6-7, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. May 18, 2009) (ECF No. 990).

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation transferred the Class Actions to the United States District Court for the Northern District of California for coordinated pretrial proceedings. Not coincidentally, the Class Actions were transferred to the same district in which the grand jury investigating the TFT-LCD industry also sits. *See* Plaintiffs' Mot. for Transfer and Consolidation of Related Antitrust Actions to the Northern District of California Pursuant to 28 U.S.C. § 1407 at 10, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 1827 (J.P.M.L. Dec. 22, 2006) (ECF No. 1) ("This Panel often gives deference to the forum where related grand jury proceedings and governmental investigations are pending.") (citations omitted). Indeed, the district judge below, the Honorable Susan Y. Illston, presides over not only the Class Actions, but also the various criminal

proceedings against TFT-LCD manufacturers. Judge Illston also granted the motions to quash that gave rise to this petition.

Plaintiffs in the Class Actions named as Defendants a number of foreign corporations, including certain Toshiba entities represented by White & Case. Personal jurisdiction over these foreign parties in the Class Actions was perfected by service of process under the Hague Convention on service of civil process abroad. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (the "Hague Convention"); Certificate of Service, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2008) (ECF No. 453-7) (certification that class action complaint was properly served under the Hague Convention on a Toshiba entity in Japan).

The Toshiba entities have steadfastly denied any wrongdoing and have not been indicted by the grand jury, which has investigated the industry for over four years; other industry participants have pleaded guilty to antitrust offenses or have been indicted and are awaiting trial.

Notably, early on in the Class Actions DOJ intervened, seeking to influence the civil discovery based on DOJ's priorities for the parallel grand jury investigation. In particular, DOJ made two arguments seeking to stay discovery in the Class Actions. App. 5a. First, DOJ argued that "because civil discovery is broader than criminal discovery, there was the risk that parties in the civil action

would be able to discover sensitive information about the grand jury investigation through civil discovery," thereby interfering with the criminal investigation. App. 5a.

Second, DOJ argued:

> [I]f civil discovery proceeded in tandem with the grand jury proceedings, employees of the companies under investigation could be placed in the *untenable position* of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter.

App. 5a (emphasis added). Thus, in addition to recognizing the broader reach of civil discovery, DOJ acknowledged the significant risks facing parties involved in both the grand jury investigation and the concurrent Class Actions.

Judge Illston granted DOJ's motion and entered an order staying most discovery and permitting DOJ to "review but not copy" the limited class-certification discovery that was allowed to proceed while the stay was in place. App. 5a. While the "review" mechanism addressed DOJ's concerns that civil discovery could interfere with the grand jury investigation, the stay order prohibited DOJ from copying civil discovery for use as evidence in the grand jury investigation.

In addition, to protect and limit the use of civil discovery, Judge Illston entered a protective order upon a finding of good cause:

> Disclosure and discovery activity in this action may involve production of trade secrets or other confidential research, development, or commercial information, within the meaning of Fed. R. Civ. P. 26(c); or other private or competitively sensitive information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted.

In re TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-1827 SI, at 1 (N.D. Cal. Dec. 10, 2007) (ECF No. 421) (Protective Order).

4. More than two years after the grand jury investigation became public, DOJ approached the parties in the Class Actions and requested copies of all civil discovery, including foreign documents and deposition testimony originating outside the United States that would otherwise lie outside the grand jury's subpoena power. When certain parties declined, DOJ demanded the entire civil discovery record (including documents produced in the future) by seeking a modification of the discovery stay order. The Toshiba entities objected, and the Honorable Fern M. Smith, a former United States District Judge sitting as Special Master in the Class Actions, issued a Report and Recommendation prohibiting DOJ from copying the foreign documents and deposition transcripts of Defendants in the Class Actions who

had not been indicted by the grand jury. App. 14a-15a. The Special Master's Report and Recommendation also prohibited DOJ from presenting any such materials to the grand jury. App. 14a. Judge Illston adopted the Special Master's Report and Recommendation. App. 9a-10a.

In these decisions, the Special Master and Judge Illston acknowledged that "[i]t is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings." App. 13a. *See also* Joel I. Klein, Assistant Attorney Gen., Antitrust Division, Statement Before the Subcommittee on Antitrust, Business Rights and Competition of the Senate Committee on the Judiciary Concerning International Antitrust Enforcement at 8 (May 4, 1999), *available at* http://justice.gov/atr/public/testimony/2413.pdf. ("The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad—out of the reach of U.S. subpoena power and search and seizure authority.").

For these reasons, when DOJ serves grand jury subpoenas, its practice is to seek foreign documents solely on a voluntary basis, a practice that initially was followed in this case: "The Division's normal procedure is to accompany subpoenas that may encompass foreign-located documents with a note to the effect that production of foreign materials should be considered voluntary unless and until the subpoena recipient is otherwise notified by the Division." ABA, Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations* 293 (3d ed. 2002) ("*Grand Jury Handbook*").

In light of these limitations on the grand jury's subpoena power, several methods have become established over time as the primary means by which federal prosecutors may request foreign discovery for a criminal investigation: (i) letters rogatory; (ii) treaties, including mutual legal assistance treaties ("MLATs"); and (iii) informal diplomatic requests. App. 7a. These established methods are set forth in DOJ's own manuals and are specifically designed to respect the rights of foreign sovereigns and foster international comity. *See* United States Department of Justice, *Criminal Resource Manual* §§ 267, 274-78, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. ("Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty.").

For example, the legal basis for letters rogatory is the principle of international comity: "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." *Grand Jury Handbook* at 281. As DOJ acknowledges: "Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds." United States

Department of Justice, Antitrust Division, *Grand Jury Manual* III-11 (1991) ("*Grand Jury Manual*"), *available at* http://www.justice.gov/atr/public/guidelines/206696.pdf.

Furthermore, the Special Master and Judge Illston emphasized in these decisions that the Toshiba entities brought the foreign discovery into the United States solely because they were compelled to do so in the civil discovery that ensued from the grand jury investigation. App. 6a, 12a-13a.

The Special Master and Judge Illston also cautioned that "defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safe-guarded, so that the government does not overstep its power, intentionally or otherwise." App. 13a. At the same time, the Special Master and Judge Illston balanced the interests of civil Plaintiffs in a prompt resolution of their claims, rather than imposing an indefinite stay of the Class Actions. Thus, these decisions preserved the "review but not copy" framework and ordered the Toshiba entities to produce immediately the foreign discovery to civil Plaintiffs in the United States. The district court did not, however, purport to address the possibility of grand jury subpoenas for the foreign-origin discovery, saying "[i]f and when the DOJ seeks to enforce existing subpoenas, or issues new subpoenas seeking the foreign documents, the matter will then be ripe for decision." App. 10a.

5. DOJ subsequently served grand jury subpoenas on four law firms representing parties involved in the Class Actions, including White & Case LLP as counsel for the Toshiba entities. The

grand jury subpoenas sought the foreign-origin documents and deposition transcripts from the Class Actions. After White & Case moved to quash the subpoenas under Rule 17(c)(2) of the Federal Rules of Criminal Procedure, DOJ filed a motion requesting that Judge Illston be assigned to the motions to quash, which were then transferred to her. The district court had jurisdiction under 18 U.S.C. § 3231 and Rule 17(c).

After full briefing and a hearing, Judge Illston quashed the grand jury subpoenas, reiterating that "the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits." App. 6a. Judge Illston also noted that the foreign-origin documents and deposition transcripts were present in the United States solely because of compelled civil discovery in the Class Actions that had followed the revelation of DOJ's grand jury investigation, and in order to obtain such materials, DOJ would normally be required to utilize one of the established methods, such as letters rogatory. App. 7a; Sealed App. 4-5.

Judge Illston also recognized the significant risks to parties involved in criminal investigations with follow-on civil litigation, as well as DOJ's role in causing the Class Actions here through the pursuit and eventual public revelation of its grand jury investigation. App. 8a; Sealed App. 6.

Additionally, Judge Illston found that there was no Ninth Circuit precedent controlling the matter: "While there is broad language in *Meserve* regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign

evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted foreign defendants." App. 7a-8a (citing *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)).

6. The Ninth Circuit reversed, holding that Judge Illston had abused her discretion. App. 2a. Contrary to the fact-intensive, circumstantial inquiry required by Rule 17(c)(2) of the Federal Rules of Criminal Procedure, the court of appeals summarily applied the *per se* rule from its *Meserve* precedent without consideration of any countervailing circumstances: "we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a (citation omitted).

The Ninth Circuit issued its mandate on December 22, 2010, and the Toshiba entities subsequently agreed to the production of all of their civil discovery to DOJ, subject to the outcome of this petition. Sealed App. 1. The Ninth Circuit's ruling remains of vital and continuing importance because the Class Actions, with ongoing civil discovery, and the grand jury investigation are both live and active. Documents and deposition testimony not yet in the United States or within DOJ's possession are subject to the Ninth Circuit's decision. In addition, DOJ assured the court below that DOJ would return all of the discovery at issue if this Court were to reverse the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and important question of federal practice on which six circuits have conflicted in reaching an intractable three-way split: namely, the correct legal standard for resolving the collision between federal grand jury subpoenas and civil protective orders. In this case, the Ninth Circuit applied its "*per se* rule" that grand jury subpoenas always trump civil protective orders, reversing the district court's order that had quashed the grand jury subpoenas in favor of the protective order previously entered by the district court. The Fourth and Eleventh Circuits follow the same *per se* rule as the Ninth Circuit.

In contrast, the Second Circuit follows virtually the opposite rule that civil protective orders are presumed to trump grand jury subpoenas absent extraordinary circumstances or compelling need by the government. Indeed, the Ninth Circuit case first adopting the *per se* rule discussed the Second Circuit's rule at length and expressly declined to follow it. It is apparent that this case would have had the opposite outcome in the Second Circuit (i.e., affirmance of the district court's order quashing the grand jury subpoenas) because DOJ undisputedly did *not* exhaust, or even pursue, other means to obtain the materials constituting the discovery in the parallel civil actions prior to issuing the grand jury subpoenas.

Furthermore, the First and Third Circuits have analyzed the irreconcilable conflict between the *per se* circuits and the Second Circuit, and have

established yet a third position, which presumes that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances. Notably, in carving out this intermediate position, both the First and Third Circuits expressly declined to follow the *per se* rule due to its inflexibility. Thus, six courts of appeals have reached an open, three-way circuit split, which is ripe for resolution by this Court.

This case demonstrates how important this issue has become, particularly in high-stakes business matters subject to grand jury investigation and parallel (usually follow-on) civil litigation. For example, as both DOJ and the district court acknowledged in this case, a civil deponent's ability to rely on a protective order in the face of a looming grand jury investigation is pivotal: when courts honor protective orders, a defendant may testify to defend himself in the civil action; otherwise, the defendant may feel compelled to assert the Fifth Amendment privilege against self-incrimination and risk potentially ruinous adverse inferences for purposes of civil liability.

The conflicting positions of the courts of appeals present a similar quandary concerning a civil defendant's determination whether to produce documents from outside the United States that would otherwise lie beyond the grand jury's territorial subpoena authority: if courts respect protective orders, a defendant can produce documents and seek a just resolution of the civil case on the merits without fear of the government using these documents in a criminal case; otherwise, the civil

defendant may forgo production and become exposed to harsh consequences including possible default.

As a result of these divergent rules of law, the collision between a grand jury subpoena and a civil protective order will be resolved in vastly different ways depending on the jurisdiction. These inconsistencies in the application of the Federal Rules of Criminal and Civil Procedure encourage forum shopping.

The Ninth Circuit's decision below exacerbates the circuit conflict by bringing into sharp focus the implications of the *per se* rule. Indeed, the district court here distinguished the Ninth Circuit's *per se* rule precisely because a mechanical priority for grand jury subpoenas over civil protective orders would enable the government to obtain materials beyond the reach of its grand jury subpoena power. That distinction was dismissed when the Ninth Circuit held that its *per se* rule gives precedence to grand jury subpoenas in all circumstances.

I. THE INTERPLAY OF GRAND JURY SUBPOENAS AND CIVIL PROTECTIVE ORDERS HAS LED TO AN EXPRESS, THREE-WAY CONFLICT AMONG SIX CIRCUITS.

A. The *Per Se* Rule Prioritizing Grand Jury Subpoenas Over Civil Protective Orders

In the decision below, the Ninth Circuit stated that "the district court abused its discretion" in granting Petitioners' motion to quash DOJ's grand jury subpoenas in favor of the district court's previously entered protective order. App. 2a. Despite the district court's detailed consideration of

the circumstances concerning the parallel grand jury investigation and class-action cases—including the extraterritorial civil discovery materials produced in reliance on the court's protective order and otherwise outside DOJ's grand jury subpoena power—the Ninth Circuit bluntly held: "we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a (citing *In re Grand Jury Subpoenas Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir. 1995)).

Thus, notwithstanding the Ninth Circuit's statement that the district court "abused" its discretion, in truth, the Ninth Circuit concluded that a district court does not have discretion to quash a grand jury subpoena in favor of a civil protective order—even where the very same district judge who entered the protective order for good cause was considering whether compliance with the subpoena would be "unreasonable or oppressive" under Rule 17(c)(2) of the Federal Rules of Criminal Procedure.

The Ninth Circuit first adopted its *per se* rule in the *Meserve* decision that was relied upon by the Ninth Circuit here. *Meserve* itself expressly discussed the then two-way circuit conflict between (i) the Second Circuit rule that prioritizes civil protective orders over grand jury subpoenas absent extraordinary circumstances or compelling need by the government, and (ii) the Fourth and Eleventh Circuits' *per se* rule that prioritizes grand jury subpoenas over civil protective orders in all circumstances. *Meserve*, 62 F.3d at 1223-26 (9th Cir. 1995) (citing, *inter alia*, *In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221 (2d

Cir. 1991); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) (divided panel); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013 (11th Cir. 1993)).

The Ninth Circuit proceeded in *Meserve* to reject unequivocally the Second Circuit position and adopt the *per se* rule that was dispositive in the outcome of this case. *Meserve*, 62 F.3d at 1226 (9th Cir. 1995) ("We adopt the *per se* rule of the Fourth and Eleventh Circuits."). When adopting the *per se* rule, the Ninth Circuit never reconciled the rigidity of that approach with the discretion conferred on district judges by Criminal Rule 17(c)(2), or the discretion likewise underlying a district judge's prior entry of a protective order under Civil Rule 26(c). Nor did the Ninth Circuit contemplate any other circumstances where a district judge might quash grand jury subpoenas in favor of a protective order, such as here where the civil discovery included materials outside the grand jury's territorial subpoena power.

B. The Second Circuit Rule Prioritizing Civil Protective Orders Over Grand Jury Subpoenas

The Second Circuit follows virtually the opposite rule from the *per se* circuits: "absent a showing of improvidence in the grant of a protective order or some extraordinary circumstance or compelling need, *a protective order is enforceable against any third party, including the government.*" *Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1224 (2d Cir. 1991) (citing *Martindell v. Int'l*

Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979)) (emphasis added).

Indeed, the Second Circuit's decision that first prioritized a civil protective order over a grand jury subpoena expressly declined to follow the *per se* rule that, at that time, had been adopted by a divided panel in the Fourth Circuit. *Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1225 (2d Cir. 1991) (holding that the court "respectfully decline[s] to follow the Fourth Circuit's apparent per se rule that a grand jury subpoena will always be enforced despite the existence of an otherwise valid protective order").

In rejecting the *per se* rule, the Second Circuit reasoned: "the government already has 'awesome powers' such as subpoenaing a witness to testify before a grand jury, which 'render unnecessary its exploitation of the fruits of private litigation.'" *Id.* at 1224 (quoting *Martindell*, 594 F.2d at 296 (2d Cir. 1979)). The Second Circuit also emphasized the important role protective orders play in promoting the full disclosure necessary for the efficient resolution of civil disputes, *id.*, as well as the strong reliance interest on protective orders that naturally follows: "In this case, there is a protective order. We see no reason on the record before us not to presume, as we have in the past, that a witness relied on it," *id.* at 1225 (citing *Minpeco S.A. v. ContiCommodity Servs., Inc.*, 832 F.2d 739, 743 (2d Cir. 1987)).

Thus, the Second Circuit openly created the initial circuit conflict on the issue presented here. And the Second Circuit's steadfast prioritization of civil

protective orders over grand jury subpoenas remains settled practice there today. *E.g.*, John Gleeson (U.S. District Judge, E.D.N.Y.), et al., *Federal Criminal Practice: A Second Circuit Handbook* § 45-6 (2010) (acknowledging circuit conflict, then stating: "In the Second Circuit, to gain access to civil discovery covered by a protective order, the government must demonstrate either 'improvidence' in granting the protective order 'or some extraordinary circumstance or compelling need.'") (quoting *Martindell*, 594 F.2d at 296 (2d Cir. 1979)). Notably, the Second Circuit's rule is frequently associated with that circuit's seminal *Martindell* decision on which the Second Circuit's 1991 decision relied, but the 1991 decision was the first in that circuit to prioritize a civil protective order in the precise context of a collision with a grand jury subpoena.

Recently, the Tenth Circuit indicated that it may be headed toward the Second Circuit rule when the Tenth Circuit followed *Martindell* to reverse a district court's modification of a civil protective order that provided IRS criminal investigators access to documents produced in reliance on the protective order. *SEC v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1272-73 (10th Cir. 2010) (relying on *Martindell*, 594 F.2d at 295 (2d Cir. 1979)).

Because it is undisputed here that DOJ failed to pursue any alternative means to acquire the materials constituting the civil discovery (App. 7a-8a), there can be no serious question that this case would have had the opposite outcome in the Second Circuit.

C. A Third Approach: The Rebuttable Presumption in Favor of Grand Jury Subpoenas

The First and Third Circuits have recognized the conflict between the *per se* circuits and the Second Circuit and have taken yet another position that presumes that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances. *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998) ("Regarding both the *Martindell* rule and the per se rule as flawed to some extent, we chart a different course. The proper approach, we think, is along the following lines: A grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order."); *In re Grand Jury*, 286 F.3d 153, 157-58 (3d Cir. 2002) ("We have not previously addressed whether, and under what circumstances, a civil protective order may shield information from a grand jury, but our sister circuits have developed three different approaches to this problem. . . . We join the First Circuit in concluding that a strong but rebuttable presumption in favor of a grand jury subpoena best accommodates the sweeping powers of the grand jury and the efficient resolution of civil litigation fostered by protective orders.").

In rejecting both the *per se* and Second Circuit approaches, the First and Third Circuits each articulated reasoning consistent with Criminal Rule

17(c)(2) and the fact-intensive, circumstantial inquiry undertaken by the district court here but rejected by the Ninth Circuit. *See Roach*, 138 F.3d at 445 (1st Cir. 1998) ("How this presumption in favor of a grand jury subpoena plays out in each individual case will depend upon the particular facts and circumstances. When called upon to adjudicate a motion to quash a grand jury subpoena in the face of a civil protective order, a district court may mull factors such as the government's need for the information *(including the availability of other sources)* . . . .") (emphasis added); *In re Grand Jury*, 286 F.3d at 162 (3d Cir. 2002) (adopting First Circuit factors, the first of which being "the government's need for the information (including the availability of other sources)").

Furthermore, the First and Third Circuits identified a "vice" in the *per se* rule—its complete lack of flexibility to consider important case-specific circumstances that could tip the balance in favor of enforcing a protective order against a grand jury subpoena:

> [The per se rule] overlooks that the balance nonetheless is variable and that the confluence of the relevant interests —generally, those of society at large and of the parties who are seeking to keep a civil protective order inviolate— occasionally may militate in favor of blunting a grand jury's subpoena.

Roach, 138 F.3d at 445 (1st Cir. 1998), *quoted in In re Grand Jury*, 286 F.3d at 162 (3d Cir. 2002).

* * *

The express three-way circuit conflict on the issue presented in this case has been acknowledged in secondary authorities. *E.g.*, 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure: Criminal* § 276 (4th ed. 2010) ("The circuits differ on the rule to be applied when a grand jury subpoena seeks material covered by a protective order in a civil case," and noting the three approaches); ABA Section of Antitrust Law, *Antitrust Law Developments* 956 (6th ed. 2007) ("A split among several circuit courts exists, however, as to whether a grand jury subpoena takes precedence over a Rule 26(c) protective order.").

Nearly half of the nation's courts of appeals have weighed in with three intractable positions, demonstrating the recurring importance of the issue. The courts of appeals are at an impasse that requires resolution by this Court.

II. THE INTERPLAY OF GRAND JURY SUBPOENAS AND CIVIL PROTECTIVE ORDERS IS A PIVOTAL ISSUE, PARTICULARLY IN HIGH-STAKES BUSINESS CASES, AND REQUIRES A UNIFORM RULE TO PREVENT FORUM SHOPPING.

As the district court in this case observed: "It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation . . . ." App. 8a. Indeed, this case is one of many recent multi-district, class-action antitrust cases that have proceeded in parallel with related grand jury investigations:

(i) *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042 (E.D. Mich. filed June 9, 2009);

(ii) *In re Processed Egg Prods. Antitrust Litig.*, No. 2:08-md-02002 (E.D. Pa. filed Dec. 2, 2008);

(iii) *In re Mun. Derivatives Antitrust Litig.*, No. 1:08-md-01950 (S.D.N.Y. filed June 18, 2008);

(iv) *In re Graphics Processing Units Antitrust Litig.*, No. 3:07-md-01826 (N.D. Cal. filed Apr. 20, 2007);

(v) *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 1:06-md-01775 (E.D.N.Y. filed June 27, 2006); and

(vi) *In re Hydrogen Peroxide Antitrust Litig.*, No. 2:05-md-01682 (E.D. Pa. filed June 17, 2005).

This dynamic of concurrent class-action cases and grand jury investigations is not limited to antitrust cases. Other examples include:

(i) ***securities cases***: *In re Wash. Mutual, Inc. Sec. Litig.*, No. 2:08-md-1919 (W.D. Wash. filed Feb. 21, 2008) (securities class action concurrent with grand jury investigation of same conduct); *Caiafa v. Comverse Tech., Inc.*, No. 1:06-cv-01825 (E.D.N.Y. filed Apr. 19, 2006), *and United States v. Alexander*, No. 06-cr-00628 (E.D.N.Y. filed Sept. 20, 2006) (indictment for conduct at issue in *Caiafa* class action); *In re Broadcom Corp. Derivative Litig.*, 2:06-cv-03252 (C.D. Cal. filed

May 25, 2006), *and United States v. Nicholas*, 8:08-cr-00139 (C.D. Cal. filed June 4, 2008) (indictment for conduct at issue in *Broadcom* class action); *Newby v. Enron Corp.*, 4:01-cv-03624 (S.D. Tex. filed Oct. 22, 2001), *and United States v. Causey*, No. 4:04-cr-00025 (S.D. Tex. filed Jan. 21, 2004) (indictment for conduct at issue in *Enron* class action);

(ii) ***product liability cases***: Toyota Motor Corp., Annual Report (Form 20-F), at 46-47 (June 25, 2010) (disclosing the existence of grand jury investigation and 200 related putative class actions concerning alleged unintended acceleration defects), *available at* http://sec.gov/Archives/edgar/data/1094517/000119312510146673/d20f.htm; *In re Pet Food Prods. Liab. Litig.*, No. 1:07-cv-02867 (D.N.J. filed June 20, 2007) (class action related to adulterated food product concurrent with grand jury investigation of same conduct); and

(iii) ***Foreign Corrupt Practices Act cases***: *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 4:09-cv-04032 (S.D. Tex. filed Dec. 18, 2009) (civil action alleging bribery by a Japanese corporation concurrent with criminal investigation of same conduct); *In re Willbros Group, Inc. Sec. Litig.*, No. 05-cv-1778 (S.D. Tex. filed May. 18, 2005), *and United States v. Steph*, No. 4:07-cr-00307 (S.D. Tex. filed July 19, 2007) (criminal indictment for conduct at issue in *Willbros* class action).

In all of these cases, and the scores of others like them, the interplay of grand jury subpoenas and civil

protective orders is a crucial issue that may fundamentally affect the course and outcome of the parallel criminal and civil matters. For example, a civil deponent who can rely on a protective order to maintain the confidentiality of his testimony is in an entirely different position from the deponent who must choose between potential self-incrimination and the potentially ruinous adverse inferences that can follow from an assertion of the Fifth Amendment. *Compare, e.g., In re Grand Jury*, 286 F.3d at 161 (3d Cir. 2002) ("deponents who have reason to fear not just embarrassment or economic disadvantage, but possible criminal charges as well, should be aware that a protective order alone cannot protect them from a grand jury investigation"), *with Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1225 (2d Cir. 1991) ("we have upheld the use of protective orders limiting disclosure of potentially incriminating testimony where parties have *voluntarily* consented to testify in civil cases in reliance upon such protective orders") (citation and internal quotation marks omitted) (emphasis in original). The differing circuit rules create inequitable results for defendants in different locations.

Similarly, in the context of document discovery, defendants in certain circuits may be forced to risk sanctions or default in civil cases to fully assert their criminal defense rights, while defendants in other circuits can avoid such problems. Such divergent outcomes in different circuits are not in the interests of justice. Discouraging compliance with discovery

requests reduces the likelihood that civil cases will be decided fairly.

The *per se* rule necessarily leads to another troubling distortion of civil litigation: class action plaintiffs in the *per se* circuits will know that overly broad discovery requests will expose defendants to greater risks in a parallel criminal investigation, thereby multiplying plaintiffs' leverage in the civil action. This is exactly the type of "*in terrorem* increment of the settlement value" that this Court recognized as problematic in *Twombly*, 550 U.S. at 558 (2007) (citation and internal quotation marks omitted). As this Court has observed, such collateral consequences of broad civil discovery can cause defendants "to settle even anemic cases." *Id.* at 559.

The unavoidable byproduct of this lack of uniformity is a perhaps irresistible temptation for plaintiffs and prosecutors to forum shop. The *per se* jurisdictions are the most desirable for plaintiffs and prosecutors alike. But "[o]ne of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts . . . ." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation and internal quotation marks omitted).

For example, all other things being equal, why would a prosecutor not choose a forum where the government could assuredly commandeer all civil discovery, including foreign materials otherwise beyond the government's subpoena power, versus a forum lacking that potentially decisive advantage? Notably, the DOJ Antitrust Division's own manual gives prosecutors broad discretion in deciding where

to empanel grand juries, and the relevant considerations include the "potential difficulties in conducting grand juries in particular jurisdictions." United States Department of Justice, Antitrust Division, *Antitrust Division Manual* III-88 (4th ed. 2008), *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf. Thus, particularly in cases of national importance, DOJ can choose among the *per se* circuits, the intermediate circuits or the Second Circuit. Indeed, it appears that DOJ could choose to have a grand jury subpoena issue from a *per se* forum to defeat a protective order entered elsewhere, as any motion to quash the subpoena would be heard in the district court where the subpoena issued. *See* Fed. R. Crim. P. 17(c)(2); *United States v. (Under Seal)*, 714 F.2d 347, 350 (4th Cir. 1983) ("The power to quash a subpoena exists in the district court of the district where the grand jury sits by reason of its inherent authority to prevent misuse of its own process.").

Similarly, civil plaintiffs will seek to file in *per se* jurisdictions to maximize their leverage over defendants by unquestionably rendering any civil discovery subject to grand jury subpoena, which may raise the risk of default.

For these reasons, this fully developed conflict among six circuits on a pivotal issue for so many important business cases is an exceedingly worthy candidate for this Court's attention and resolution.

III. THE NINTH CIRCUIT'S DECISION EXACERBATES THE CIRCUIT CONFLICT BY ENABLING FEDERAL PROSECUTORS TO CIRCUMVENT TERRITORIAL LIMITATIONS ON GRAND JURY SUBPOENA AUTHORITY.

A. The Ninth Circuit's decision in this case exacerbates the circuit conflict by enabling DOJ, apparently for the first time in a reported case, to circumvent the U.S. territorial limitations on grand jury subpoena authority. Before the district court and the Ninth Circuit, DOJ disputed that it was extending its jurisdictional reach or offending foreign sovereignty, arguing that it was seeking civil discovery that had been brought into the United States and thus within DOJ's jurisdictional reach. This argument failed to account for three important circumstances: (i) there is no dispute that the foreign documents in question were generated and maintained entirely overseas in the normal course of business; (ii) DOJ never attempted to obtain these documents through letters rogatory, an MLAT or diplomatic channels; and (iii) DOJ sought to exploit civil discovery to obtain what DOJ could not obtain directly by grand jury subpoena.

The district court here appreciated these special circumstances and rejected DOJ's argument that subpoenaing the civil discovery would not circumvent the territorial limitations on grand jury subpoena power. Indeed, the district court distinguished the Ninth Circuit's *per se* rule precisely to avoid that outcome:

> While there is broad language in *Meserve* [i.e., the Ninth Circuit precedent adopting the *per se* rule] regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted foreign defendants. It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery.

App. 7a-8a.

The district court also noted that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power." App. 6a (citations and internal quotation marks omitted) (emphasis in original).

The Ninth Circuit, however, held that these important circumstantial issues were irrelevant under the inflexible *per se* rule. That holding, which would *not* have followed in either the Second Circuit or the circuits following the intermediate rule, has

serious implications under the foreign-sovereignty and international-comity principles that dictate the limitations on the government's extraterritorial subpoena power in the first place. *See Grand Jury Manual* III-11 ("Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty.").

In the Ninth Circuit and the other *per se* circuits (Fourth and Eleventh), prosecutors can now sidestep the settled international methods for obtaining evidence from abroad—letters rogatory, MLATs and diplomatic channels—in favor of a grand jury subpoena for the entire discovery record from a parallel civil action. This significant departure from settled practice is not one of form over substance because the internationally accepted methods for obtaining foreign evidence require not only notice to the applicable foreign sovereign, but a substantive determination by that sovereign as to whether the materials should be produced: "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." *Grand Jury Handbook* at 281.

Because the *per se* circuits' interpretation of the Federal Rules of Criminal and Civil Procedure enables DOJ to circumvent internationally accepted methods for a sovereign's request for evidence—including another sovereign's right to refuse—that interpretation should be avoided under the

"prescriptive comity" rule of construction. *See, e.g., F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.").

Furthermore, this circumvention of the settled international methods for governments to obtain evidence is particularly problematic in areas where the applicable foreign sovereign does not share the enforcement or regulatory views of the United States. *See* Restatement (Third) of Foreign Relations Law of the United States § 442 reporter's n.1 (1987) ("To a considerable extent, the hostility to United States discovery practice reflects dislike of aspects of substantive American law, notably United States antitrust law and laws providing for regulation of international shipping.").

DOJ's circumvention of established methods is all the more troubling because DOJ exploited civil jurisdictional devices never intended to be used in the criminal context to further its grand jury investigation. The Hague Convention "is a multilateral treaty . . . . [that] provide[s] a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988). The Hague Convention, however, expressly applies only in civil cases. *See id.* at 699 (noting that Article 1, which states that the "Convention shall

apply in all cases, in civil or commercial matters," defines the scope of the convention).

Here, in the Class Actions, the district court perfected specific personal jurisdiction over the Toshiba entities from Japan through the Hague Convention. Thus, by taking the Toshiba entities' civil discovery for the grand jury investigation, DOJ exploited civil jurisdictional and discovery rules, neither of which were ever intended to be used in the criminal context. Under the *per se* rule, courts apparently do not have the discretion to remedy this untoward result.

DOJ's disregard of sovereignty, comity and due process inevitably provokes concern about reciprocal treatment of U.S. natural and legal persons, among other reverberations. *Cf., e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 12, Goodyear Luxembourg Tires, S.A. v. Brown, (No. 10-76) (U.S. filed Nov. 19, 2010) ("Decisions like the one at issue here may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade. Conversely, a United States corporation concerned about facing a similar rule abroad might be equally dissuaded from exporting its products."); United States Department of State, *Enforcement of Judgments* (emphasizing that the United States has failed to conclude a bilateral treaty or multilateral convention with "any other country on reciprocal recognition and enforcement of judgments[,]" largely because "foreign countries have objected to the extraterritorial jurisdiction asserted by courts in the United

States."), http://travel.state.gov/law/judicial/judicial_691.html (last visited Feb. 23, 2011).

B. The inability of the *per se* rule to prevent circumvention of the territorial limitations on DOJ's grand jury subpoena power has special implications in international cartel matters. The European Union and numerous individual countries on six continents have adopted antitrust regimes at least somewhat modeled on the antitrust amnesty program administered by DOJ in the United States: to destabilize cartels, the regulators provide some form of leniency to companies who self-report anticompetitive conduct. To further encourage such self-reports, the regulators almost always promise to maintain the confidentiality of the information submitted to them by a leniency applicant. Such self-reports sometimes occur in multiple jurisdictions around the world, and companies will also selectively self-report in some jurisdictions but not others.

In the United States, follow-on, class-action plaintiffs now routinely seek in discovery leniency applications or leniency statements that were submitted by civil defendants to foreign regulators. In the parallel Class Actions, for example, Plaintiffs currently are seeking such leniency applications that may have been submitted by other Defendants to the European Commission and the Japan Fair Trade Commission. The European Commission has appeared specially in the litigation to object to such discovery:

> The leniency program is the most effective tool at the Commission's

> disposal for the detection of cartels. Its success is crucially dependent on the willingness of companies to provide comprehensive and candid information. This willingness could disappear if potential leniency applicants would know that their corporate statements could become discoverable in civil litigation. The discoverability of corporate leniency statements in civil litigation could lead to the incongruous result that a cartel member that has chosen to cooperate with the Commission could wind up being in a worse position—with regard to civil claims—than those cartel members that have refused to cooperate.

Letter from the Director General of the Directorate General for Competition, European Commission, to the Hon. Susan Y. Illston at 6, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2011) (ECF No. 2450) ("EC Letter"). The Japan Fair Trade Commission has filed a similar objection that such disclosure would undermine the agency's leniency program. *See* Letter from the Director General of the Investigative Bureau, Japan Fair Trade Commission, to Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-1827 SI (N.D. Cal. Feb. 3, 2011) (ECF No. 2392).

Notably, the European Commission expressly stated that it lacked the resources to intervene every time the issue arises: "it is not possible for the

Commission to intervene as amicus curiae in various jurisdictions around the world where disclosure of documents from its investigative file is often requested." EC Letter at 8. Thus, such non-U.S. regulators effectively must depend on civil defendants to raise and win such objections, but such defendants are not well-positioned to assert the sovereign rights and interests of foreign regulators and such materials have been produced in civil discovery—almost always subject to a protective order, however. *E.g., Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, No. 05-6042 (JBS), 2008 WL 4126602, at *8 (D.N.J. Aug. 27, 2008) (granting motion to compel documents referring and relating to EC decision against Defendant).

The *per se* rule gives U.S. prosecutors *carte blanche* to pierce protective orders to obtain such leniency materials produced in civil discovery that the prosecutors would not be able to obtain directly from foreign regulators (absent the consent of the self-reporting company). This outcome undermines these leniency programs for the reasons stated by the European Commission and Japan Fair Trade Commission—but for greater reason given the added dimension of U.S. criminal exposure. In other words, because of the *per se* rule, when a company applies to a foreign regulator for leniency, the leniency materials will be subject to grand jury subpoena by DOJ, thereby automatically exposing that company to U.S. criminal liability.

In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004), the United States, Belgium, Canada, Germany, Japan, the Netherlands,

and the United Kingdom participated as *amici curiae* on the merits arguing that this Court should consider the disincentive that U.S. civil liability for antitrust offenses unrelated to the United States would have on self-reporting. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioners at 20, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) ("The court of appeals' interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability.").

The regulators' point in *Empagran* applies with greater force if leniency applicants must consider not only civil liability in the United States but exposure to U.S. criminal liability because U.S. district judges are not permitted the discretion to uphold protective orders on leniency materials produced in civil litigation.

* * *

The issue squarely presented by this petition has divided the courts of appeals. These inconsistent rules of law have led to unacceptable and unpredictable results for litigants who wish to defend civil cases on the merits in reliance on a protective order and who are served with grand jury subpoenas. These inconsistent results are particularly troubling for parties in complex business cases, where the scope of discovery is broad and the costs are enormous. The Ninth Circuit's decision also enables prosecutors to circumvent the territorial limitations on grand jury subpoena authority, with resulting

implications for foreign sovereignty and international comity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 25, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 10-15758

In re GRAND JURY SUBPOENAS, served on
White & Case LLP, Lieff, Cabraser,
Heinemann, Bernstein LLP,
K&L Gates LLP, and Nossaman LLP,
United States of America,
Appellant.

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted Nov. 3, 2010.
Filed Dec. 7, 2010.

Before: JOHN T. NOONAN and RICHARD A. PAEZ,
Circuit Judges, and KEVIN THOMAS DUFFY,
District Judge.*

James J. Fredricks, United States
Department of Justice, Washington, D.C.,
for appellant the United States.

Christopher M. Curran (argued), White & Case LLP,
Washington, DC, John H. Chung, White & Case LLP,
New York, NY, for White & Case LLP, et al.

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* The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

OPINION

NOONAN, Circuit Judge:

The United States appeals an order of the district court quashing certain subpoenas directed to the respondent law firms named in the caption of the case (the Law Firms). The subpoenas sought nonprivileged material in aid of a grand jury investigating the clients of the Law Firms. The material had been obtained by the firms as a result of civil discovery in an antitrust suit. Holding that the district court abused its discretion, we reverse its order.

BACKGROUND

In 2006, the United States was conducting an antitrust investigation into alleged criminal conduct. Soon after this investigation became public, a number of civil suits were filed by private plaintiffs against the companies under investigation. These suits were consolidated in the Northern District of California before District Judge Illston. The litigation resulted in the production by the civil defendants of documents originating outside the United States. The documents at issue here came into the possession of the Law Firms in the United States.

In this case the United States subpoenaed these documents. Invoking Federal Rule of Criminal Procedure 17, the Law Firms moved to quash. The district court stated that it found no authority governing the case. It concluded: "However, because the motions to quash raise novel issues with potentially far-reaching implications about the power of the grand jury and the relationship between grand jury proceedings and civil discovery of unindicted foreign defendants, the Court finds it is more prudent to quash the subpoe-

nas and allow the DOJ to raise these issues on appeal to the Ninth Circuit."

This appeal followed.

ANALYSIS

On appeal, the Law Firms argue that the district court exercised its discretion under Fed.R.Crim.Proc. 17 to quash the subpoenas and that the court of appeals should respect its reasonable exercise of discretion. We do not read the district court's decision as an exercise of discretion but as a passing of the decision to this court. We are not reviewing an exercise of discretion but a request for guidance.

[1] No collusion between the civil suitors and the government has been established or even suggested by the Law Firms. Indeed, the district court determined that the government had not engaged in any bad faith tactics. Moreover, the Law Firms do not claim that the documents are privileged. Accordingly, we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order. *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir.1995). By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury. *See* 18 U.S.C. § 3332.

[2] For this reason, the order of the district court is REVERSED. The subpoenas may be enforced.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

STATEMENT OF REASONING INVOLVED IN COURT'S ORDER OF FEBRUARY 11, 2010

The Court issued an order, filed under seal, on February 11, 2010. The Government objects to a request made by certain defendants to unseal that order. The Government asserts that unsealing the order would violate Rule 6(e)(6) of the Federal Rules of Criminal Procedure, which governs grand jury proceedings. The Government adds, however, that "the Court is fully aware of its legal reasoning and is at liberty to draw upon and even share its reasoning in the context of the civil dispute." The Court does so here.

BACKGROUND

Shortly after the civil cases were transferred to this district for multidistrict proceedings, the Department of Justice sought to intervene in the MDL for the purpose of seeking to limit discovery in the civil actions. By order filed July 10, 2007, the Court permitted the DOJ to intervene. The DOJ then moved to stay civil discovery on two grounds. First, the DOJ asserted that because civil discovery is broader than criminal discovery, there was the risk that parties in the civil action would be able to discover sensitive information about the grand jury investigation through civil discovery. Second, the DOJ argued that if civil discovery proceeded in tandem with the grand jury proceedings, employees of the companies under investigation could be placed in the untenable position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter. The Court granted the DOJ's motion to stay discovery until May 2008, but permitted certain limited categories of non-grand jury discovery to proceed. The stay order permitted the DOJ to review but not copy all discovery produced by a party. Docket No. 306 in M 07-1827 SI. In May 2008, the stay order was revised to permit certification discovery.

The parties in the MDL negotiated a protective order to preserve the confidentiality of the documents produced pursuant to civil discovery. The December 10, 2007 stipulated protective order provides that the parties may use civil discovery materials "only in connection with this [civil] action for prosecuting,

defending, or attempting to settle this action." In 2009, the DOJ sought to modify the September 2007 stay order to allow the DOJ to copy, and not just review, all documents produced in the MDL. The Court initially granted the motion, but in response to concerns raised by defendants, referred the parties to the Special Master to explore modifications to the discovery plan. After briefing and a hearing, the Special Master recommended that DOJ be permitted to review all civil discovery, but prohibited from making any copies of the overseas discovery, including deposition transcripts, of the unindicted defendants. The Special Master found that the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits. The Special Master stated that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power," and she noted that the foreign defendants had "vociferously argued against producing either their documents or their employees into this country during this entire litigation." Report & Recommendation Re: Toshiba Entities' Motion for Modifications to the Discovery Schedule and Plan at 2:25-26 (emphasis added). The Special Master found that "those defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safe-guarded, so that the government does not overstep its power, intentionally or otherwise." *Id.* at 3. The Special Master was also concerned that any criminal indictments that flowed from the grand jury's review of overseas documents produced in the civil matter could be subject to challenge. This Court adopted the Special Master's

R & R in an order filed October 20, 2009. That order provided that "the United States shall be limited to reviewing access only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, as well as the other non-indicted foreign defendant (such as . . . Hannstar Display Corporation)."

DISCUSSION

The central question considered in the February 11, 2010 order was whether a grand jury may subpoena foreign-based documents that would otherwise be outside the geographic scope of its subpoena power, but that are located in the United States by virtue of the civil discovery in a related MDL proceeding. The documents in question might otherwise be obtained by (1) letters rogatory, (2) requests made under executive agreements or treaties, such as mutual legal assistance treaties, and (3) informal means.

The Court considered *In Re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995), to determine whether the grand jury might have the authority to subpoena such foreign documents. In *Meserve*, the Ninth Circuit established a *per se* rule that protective orders cannot shield discovery from grand jury subpoenas, and the court held that a criminal grand jury could subpoena documents that were subject to a protective order in a closed civil case. *Id.* at 1226. While there is broad language in *Meserve* regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted

foreign defendants. It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery. Ordinarily a grand jury would be required to obtain foreign material through letters rogatory or other methods. The Court did not find precedent in the case law, and was dubious about establishing such precedent, to permit grand juries to obtain foreign discovery for criminal grand jury proceedings when that evidence is present in the United States only as a result of related civil actions.

The Court felt it possible that such actions might ultimately jeopardize the criminal proceedings. The Court therefore found it is prudent allow the appellate process to establish such precedent if appropriate.

Dated: March 29, 2010

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

ORDER DENYING UNITED STATES' OBJECTIONS TO SPECIAL MASTER'S AUGUST 24, 2009 REPORT AND RECOMMENDATION; ADOPTING REPORT AND RECOMMENDATION

On October 9, 2009, the Court heard argument on the United States' objections to the Special Master's August 24, 2009 Report and Recommendation Re: Toshiba Entities' Motion for Modifications to the Discovery Schedule and Plan. The Court DENIES the United States' objections and hereby ADOPTS the Report and Recommendation. As set forth in the Report and Recommendation, the United States shall be limited to reviewing access only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, as well as the other non-indicted foreign defendants (such as the Chi Mei defendants and

Hannstar Display Corporation). In accordance with the Report and Recommendation, Toshiba and AUO are ordered to immediately produce the overdue foreign discovery and proceed with depositions as anticipated.

The Toshiba entities also seek an order prohibiting the Department of Justice from issuing subpoenas for the foreign documents. The Court DENIES that request. If and when the DOJ seeks to enforce existing subpoenas, or issues new subpoenas seeking the foreign documents, the matter will then be ripe for decision. Alternatively, the Toshiba entities seek a stay on foreign discovery. The Court DENIES that request because a stay would be unfair to the civil plaintiffs whose discovery from Toshiba has already been delayed for over a year.

Accordingly, the Court DENIES the DOJ's objections (Docket No. 1258) and ADOPTS the Report and Recommendation (Docket No. 1223). The Court also GRANTS the Toshiba Entities' motion for leave to file a response to the direct purchasers plaintiffs' response, and that response shall be considered part of the record. (Docket No. 1315).

IT IS SO ORDERED.

Dated: October 20, 2009

SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

Master File No. M07-1827 SI
MDL No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Document Relates to:
ALL ACTIONS

REPORT & RECOMMENDATION RE:
TOSHIBA ENTITIES MOTION FOR
MODIFICATIONS TO THE DISCOVERY
SCHEDULE AND PLAN

On June 19, 2009, the District Court heard argument on the United States' motion to modify the Court's September 25, 2007 Order by permitting the DOJ Antitrust Division to receive copies of all discovery in this civil matter, including deposition transcripts. The Court's earlier order had permitted the DOJ to review but not copy that discovery. Civil Defendants Toshiba and AUO were the only parties to oppose the motion.

After briefing and oral argument, the Court granted DOJ's motion, finding that "the DOJ does not seek to compel foreign discovery that would otherwise be outside the grand jury's subpoena power, but instead

seeks copies of evidence brought into the United States as part of discovery in this case." (See Court's Order of June 24, 2009.) The Court then stated that "it may be appropriate to explore modifications to the discovery schedule and plan," referring such matter to the undersigned. Toshiba responded by filing a letter brief before the Special Master on July 15, 2009, to which AOU joined but made no separate arguments.

The relief asked for was a stay of production of the Toshiba Entities' overseas documents and the merits depositions of their overseas employees.

Both direct and indirect Plaintiffs filed oppositions. Because the Special Master believed that Toshiba had raised a colorable argument, not specifically addressed by the Court's June 24 Order, an in-person hearing was held on August 12, 2009, before the Special Master, to which the DOJ was requested to appear. The DOJ appeared at the hearing and also filed a follow-up letter brief on August 17, which has been read and considered. (The issue of whether the DOJ should have been served with the Toshiba motion is not material and need not be addressed.)

The critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power. The Special Master is cognizant that Judge Illston's conclusion in her June 24 Order appears to answer that question in the negative, and it is not within my authority or my intent to countermand her findings. My recommendations are offered for her consideration only. There is reason to believe, however, that there are distinctions to be made in this specific

instance that were neither addressed in the authorities cited, nor argued to the court.

It is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings. The authorities for that were cited and well argued in the DOJ's June 19 Motion and need not be set forth again. The DOJ is also correct in its argument that once foreign companies and individuals "choose to avail themselves of United States' courts and bring evidence from overseas into the United States, the grand jury is entitled to subpoena it." (US Reply to AUO and Toshiba's Opposition to US Motion to Modify the Court's September 25, 2007 Order).

The problem here is that Defendants did not "choose to avail themselves" of the US courts or voluntarily "bring evidence from overseas into the United States." Rather they were hauled, kicking and screaming, into our courts and have vociferously argued against producing either their documents or their employees into this country during this entire litigation. That resistance has been difficult for Plaintiffs and for the Court, and has resulted in expensive and time-consuming discovery disputes. Colorable arguments can and are made that, having put their products into the American stream of commerce and having made significant profits from so doing, resisting civil litigation over those products in our courts is unjustified and an abuse of our judicial system. Be that as it may, those defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safeguarded, so that the government does not overstep its power, intentionally or otherwise.

At the same time, Plaintiffs in this civil litigation have been significantly delayed in seeking resolution of their claims, primarily due to issues related to the parallel government investigation. To re-impose a further stay on discovery at this late stage seems unfair to them. The question then is whether there is some procedure that is reasonably responsive to the positions of all sides.

Because this issue arises out of the governments June motion to modify, it is useful to look at the reasons for its request. The government already had the right to review, but not copy, all discovery in this matter. The only argument it gives for needing actual copies is one of convenience. i.e. that "the large amount of discovery, including over 100 deposition transcripts, will make in-person review of these materials at an off-site location impractical and inefficient" and that it "would be less burdensome for the DOJ to make copies of the documents and review them in its own office." Although true, we are considering now only a small sub-set of that discovery, i.e. foreign documents of unindicted Defendants Toshiba and AUO that are brought into the United States by court order and deposition transcripts of foreign national employees from those same defendants. Other than inconvenience, the government has cited no prejudice to its interests from the earlier procedure of limited access. Nor is there any prejudice to Plaintiffs from maintaining that earlier status. Finally, as long as copies of its foreign discovery are not available for presentation to the grand jury, the prejudice to defendants, if any, appears minimal.

For the reasons stated, the Special Master recommends that the Court modify its Order of June 24, 2009, to limit the United States to reviewing access

only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, brought into the United States under court order in this civil litigation. A protective order should also issue, protecting this limitation from production by other parties. (Information about Toshiba and/or AUO contained in documents and depositions of other parties would not be covered by this order.) It should be noted that the DOJ argued at the hearing that it could then subpoena the subject documents and that its subpoena power would "trump" any Protective Order issued by this court. That issue is not ripe for decision at this time.

Once the Court has ruled on this Report and Recommendation, Toshiba and AUO should immediately produce the overdue foreign discovery and proceed with depositions as anticipated. As always, should the Court have any questions, I am available to respond further.

Respectfully submitted,

HON. FERN M. SMITH (RET.)
HON. FERN M. SMITH (RET.)
SPECIAL MASTER

DATED: AUGUST 24, 2009

[PROPOSED] ORDER

Good cause appearing, the Court hereby adopts the Special Master's Report and Recommendation.

_____

DATED: _____
HON. SUSAN ILLSTON
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

ORDER GRANTING UNITED STATES'
MOTION TO MODIFY THE COURT'S
SEPTEMBER 25, 2007 ORDER

On June 19, 2009, the Court heard argument on the United States' motion to modify the Court's September 25, 2007 Order Granting United States' Motion to Stay Discovery. (Docket No. 990). The September 25, 2007 order permits the Department of Justice, Antitrust Division to review all discovery in this matter. DOJ seeks to modify the order to permit DOJ receive copies of all discovery in this matter, including deposition transcripts.

The motion is unopposed by plaintiffs and all defendants except the AUO and Toshiba defendants. The Court does not find appropriate AUO's proposal to allow questioning of deponents regarding the grand jury proceedings or the witnesses' testimony.

As the government notes, witnesses may voluntarily disclose information about the grand jury proceedings and their testimony, and the current limitations only prohibit attorneys from compelling testimony in a deposition.

The Court is also not persuaded by the objections raised by Toshiba, and finds that the DOJ should be permitted to receive copies of the documents and transcripts in these proceedings. *Cf. In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1224-26 (9th Cir. 1995). The DOJ does not seek to compel foreign discovery that would otherwise be outside the grand jury's subpoena power, but instead seeks copies of evidence brought into the United States as part of discovery in this case. As discussed at the June 19, 2009 hearing, it may be appropriate to explore modifications to the discovery schedule and plan, and if the Toshiba defendants (or any other parties) wish to do so, they should meet and confer and discuss the matter with Judge Smith.

IT IS SO ORDERED.

Dated: June 24, 2009

SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

SUPREME COURT, U.S.
FILED
MAY 26 2011
OFFICE OF THE CLERK

Nos. 10-1147 and 10-1176

In the Supreme Court of the United States

WHITE & CASE LLP, PETITIONER

v.

UNITED STATES OF AMERICA

NOSSAMAN LLP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
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QUESTIONS PRESENTED

1. Whether a civil protective order that permits disclosure of discovery materials at trial, in support of motions, and to state attorneys general provides a basis for quashing federal grand jury subpoenas seeking non-privileged, pre-existing corporate documents provided in civil discovery to class action plaintiffs (Nos. 10-1147, 10-1176).

2. Whether a grand jury subpoena may be quashed because it seeks documents of foreign corporations that were brought to the United States for civil discovery. (No. 10-1176).

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In the Supreme Court of the United States

No. 10-1147

WHITE & CASE LLP, PETITIONER

v.

UNITED STATES OF AMERICA

No. 10-1176

NOSSAMAN LLP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a)[1] is reported at 627 F.3d 1143. The sealed opinion of the district court quashing the grand jury subpoenas (Pet. Sealed App. 2-7) is unreported.[2]

[1] Citations to the petition and petition appendix are to petitioner White & Case's filings unless otherwise noted.

[2] Petitioners erroneously include as an opinion below the "Statement of Reasoning Involved in Court's Order of February 11, 2010," which

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2010. The petition for a writ of certiorari in No. 10-1147 was filed on February 25, 2011, and the petition for a writ of certiorari in No. 10-1176 was filed on March 4, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners White & Case LLP and Nossaman LLP represent certain defendants in antitrust class actions pending in the Northern District of California, including petitioners AU Optronics Corporation and AU Optronics Corporation of America (collectively AUO). A federal grand jury served subpoenas duces tecum on the law firms seeking non-privileged, pre-existing corporate records of petitioners' clients relevant to "an antitrust investigation into alleged criminal conduct." Pet. App. 2a. The district court granted petitioners' motions to quash the subpoenas, and the court of appeals reversed. *Id.* at 2a-3a.

1. In 2006, a Northern District of California grand jury investigation into an alleged price-fixing conspiracy in the Thin-Film Transistor-Liquid Crystal Display (TFT-LCD) industry became public. Pet. App. 2a; Gov't C.A. Br. 4. Subsequently, numerous "civil suits were filed by private plaintiffs against the companies under investiga-

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the district court entered in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, 2010 WL 1264601 (N.D. Cal. Mar. 29, 2010). Pet. App. 4a-8a. The court issued that statement in the separate civil action and did so after the United States appealed the order quashing the subpoenas in this case. The statement's reasoning differs somewhat from the order reversed by the court of appeals. See Pet. Sealed App. 2-7.

tion." Pet. App. 2a. After these lawsuits were transferred to the Northern District of California for coordinated proceedings, the United States moved to intervene in the civil case for the limited purpose of obtaining a partial stay of discovery to minimize the possibility that the civil litigants might discover sensitive information about the grand jury investigation. Gov't C.A. E.R. 35-43. The district court granted this motion, stayed most discovery for several months, and authorized the United States to review, but not copy, all discovery produced by any party. *Id.* at 44-47.[3]

Months later, the court entered a stipulated protective order protecting material produced in discovery containing trade secrets and other confidential, private, or competitively sensitive information from disclosure and limiting the stipulating parties' use of this material to prosecuting, defending, or attempting to settle the civil action. Gov't C.A. E.R. 48-61.[4] By its express terms, the protective order did not provide "blanket protections" for all discovery or any "entitlement to file confidential information under seal," and it specifically excepted from its protections any "presentations of evidence and argument at hearings on dispositive motions and at trial." *Id.* at 48,

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[3] In January 2010, government attorneys reviewed a small number of documents from AUO and another defendant (but not any from White & Case's clients). Gov't C.A. E.R. 178. They "uncovered, almost immediately, extensive evidence of a worldwide conspiracy to fix the prices of TFT-LCD panels." *Ibid.* Among the documents were minutes documenting hotel room meetings of major producers to agree on prices. *Ibid.* There were also "documents reflecting efforts to hide or destroy incriminating emails." *Ibid.* These documents were not provided to the grand jury at that time, however, because the district court prohibited the government from making copies. Gov't C.A. Br. 10.

[4] The United States did not sign or stipulate to this order.

60. In the event of a discovery request, subpoena, or order in other litigation compelling disclosure of protected material, the protective order required notice to the party designating the material confidential to afford it the opportunity to protect its confidentiality in the other litigation, but the order specified that it did not authorize any party to disobey a lawful directive from another court. *Id.* at 58.[*]

Pursuant to discovery orders in the civil case, foreign-located corporate civil defendants brought pre-existing corporate documents into the United States from abroad and produced them to the law firms representing the plaintiffs and numerous corporate defendants. Gov't C.A. E.R. 197, 199.

2. In late 2006, the federal grand jury issued subpoenas duces tecum to several companies in the United States seeking, among other things, the documents currently at issue. At that time, the government deferred enforcement of the subpoenas with respect to documents outside the United States, but requested their production on a voluntary basis. Gov't C.A. E.R. 143. Over the next several years, many companies, but not petitioners or their clients, voluntarily produced their foreign-located documents.

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[*] Subsequently, at the request of the States of Washington and Illinois, the district court clarified that the protective order "does not and was not intended to interfere with any lawfully issued State subpoena or civil investigative demand," but "direct[ed] that any party who receives documents marked 'confidential' or 'highly confidential' pursuant to a discovery request, subpoena or CID shall not provide those documents to the U.S. Department of Justice absent further order of this Court." Order Clarifying Stipulated Protective Order 1-2, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. May 4, 2010).

After discovering that the clients of the law-firm petitioners had sent documents responsive to the original grand jury subpoenas to petitioner-law firms and that the documents had subsequently been produced to plaintiffs' counsel, the grand jury issued new subpoenas duces tecum to petitioner-law firms, one other law firm defending a class action defendant, and the lead counsel for the direct purchaser plaintiffs in the civil case. Gov't C.A. E.R. 68-140, 197, 199. The subpoenas served on petitioner-law firms and the other defense firm sought various categories of their clients' "non-privileged" corporate documents in the United States and in the possession of the firms[6]; the subpoena served on plaintiff's counsel sought the documents produced to it by the defense firms' clients. *Id.* at 68-140.

3. Petitioners moved to quash the subpoenas arguing, among other things, prosecutorial misconduct. The district court rejected this argument, finding "that the government had not engaged in any bad faith tactics." Pet. App. 3a; see Pet. Sealed App. 6 n.1. Nevertheless, it quashed the subpoenas. The court acknowledged the holding in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-1227 (9th Cir. 1995), that a grand jury subpoena can be used to obtain civil discovery notwithstanding the existence of a

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[6] Specifically, the subpoenas at issue, with one exception, sought only relevant corporate documents for a period that predated the private lawsuits. See, *e.g.*, Gov't C.A. E.R. 99-100 (seeking relevant corporate documents for "the period of January 1, 1998 through December 7, 2006") (emphasis omitted). The exception is a demand, without any time limitation, for documents relating to any actual, possible, or proposed cartel agreement. *Id.* at 111. An admission of such an agreement contained in a response to a deposition question or interrogatory answer would be responsive to this subpoena provision.

protective order in a civil case. The district court declined to follow *Meserve*, however, on the ground that the decision did not address foreign evidence. Pet. Sealed App. 5-6.

The court of appeals reversed. Pet. App. 1a-3a. The court noted that petitioners had made no claim of privilege. *Id.* at 3a. Nor had they established, or even suggested, "collusion between the civil suitors and the government." *Ibid.* "Indeed, the district court determined that the government had not engaged in any bad faith tactics." *Ibid.* Under these circumstances, the court applied *Meserve*'s "per se rule that a grand jury subpoena takes precedence over a civil protective order." *Ibid.* The court observed that as a result of the civil action, "documents have been moved from outside the grasp of the grand jury to within its grasp." *Ibid.* The court found no authority that precluded "the government from closing its grip on what lies within the jurisdiction of the grand jury." *Ibid.*[7]

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[7] After the court of appeals issued its mandate, the grand jury obtained copies of all of the documents at issue in this appeal that were in the possession of plaintiffs' counsel. The United States has committed to return the documents if a petition for certiorari were granted and the court of appeals decision reversed.

To date, 21 individuals and eight companies have been charged with price fixing. Of these, ten individuals and seven companies have pleaded guilty for their role in the price-fixing conspiracy. These convictions have resulted in criminal fines totaling more than $890 million. Press Release, U.S. Dep't of Justice, *Former HannStar Executive Agrees to Plead Guilty and Serve Jail Time for Participating in Global LCD Price-Fixing Conspiracy* (Oct. 27, 2010), http://www.justice.gov/atr/public/press_releases/2010/263532.pdf.

Petitioner Nossaman's clients—fellow petitioners AU Optronics Corporation and AU Optronics Corporation America—have been indicted by the grand jury and charged with price fixing. Their case is

ARGUMENT

Petitioners contend that grand jury subpoenas cannot be used to obtain pre-existing, non-privileged corporate documents in the United States that might contain evidence of a crime and that have already been produced to private plaintiffs. They rely on a civil protective order that was limited by its terms to only the pretrial stages of the civil litigation and that permitted disclosure to state attorneys general. The court of appeals correctly rejected this claim, and, although the circuits have adopted somewhat different positions on when grand jury subpoenas may be used to obtain materials covered by a civil protective order, no other court of appeals would have decided this case differently. Further review is not warranted.

1. Petitioners contend that the circuits are split three ways on the standard to apply when deciding whether a protective order in a civil case precludes enforcement of a grand jury subpoena seeking information subject to that order. Pet. 16-23; Nossaman Pet. 14-22. Specifically, petitioners claim that the Fourth, Ninth, and Eleventh Circuits apply a per se rule that always enforces grand jury subpoenas notwithstanding a civil protective order,[8] the First and Third Circuits apply a rebuttable presumption that a grand jury subpoena should be enforced not-

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scheduled for trial later this year. Petitioner White & Case's clients have not been indicted.

[8] *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir.), cert. denied, 487 U.S. 1240 (1988); *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-1227 (9th Cir. 1996); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1020 (11th Cir. 1993).

withstanding a protective order,[9] and the Second Circuit applies a rebuttable presumption that a protective order precludes a subpoena's enforcement.[10] To the extent there is disagreement in the courts of appeals on the relationship between grand jury subpoenas and civil protective orders, this case does not implicate it. The subpoenas at issue here would have been enforced in any circuit.

a. Petitioners significantly overstate the difference between the rule applied in the Fourth, Ninth, and Eleventh Circuits (which petitioners characterize as a "per se" approach) and the rule applied by the First and Third Circuits, which apply a rebuttable presumption that a grand jury subpoena should be enforced even when there is a civil protective order. As a practical matter, little if any difference has emerged in the application of those rules.[11]

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[9] *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir.) (*Roach*), cert. denied, 524 U.S. 939 (1998); *In re Grand Jury*, 286 F.3d 153, 157-158 (3d Cir. 2002).

[10] *In re Grand Jury Subpoena Dated Apr. 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991).

[11] Although the Ninth Circuit in this case "appl[ied] [its] per se rule that a grand jury subpoena takes precedence over a civil protective order," it first noted that "[n]o collusion between the civil suitors and the government has been established or even suggested by [petitioners]." Pet. App. 3a. Reflecting the general rule that grand juries cannot subpoena information protected by the attorney-client privilege, *Swidler & Berlin* v. *United States*, 524 U.S. 399, 401-409 (1998), the court of appeals also noted that petitioners "d[id] not claim that the documents are privileged." The Fourth Circuit, another court of appeals that purportedly follows the "per se" rule, has cautioned that "Fifth [A]mendment and ethical concerns obviously would be raised * * * if the government directly or indirectly sponsored a civil lawsuit or discovery requests in a civil lawsuit for the purpose of aiding a criminal investigation." *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 n.6, cert. denied, 487 U.S. 1240 (1988). In finding a grand jury

While the First and Third Circuits describe the rule they follow in this context differently from the Fourth, Ninth, and Eleventh Circuits, little if any functional difference distinguishes their approaches. In the First and Third Circuits, a grand jury subpoena overrides a protective order unless the party seeking to quash the subpoena shows "exceptional circumstances that clearly favor subordinating the subpoena to the protective order." *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir.) (*Roach*), cert. denied, 524 U.S. 939 (1998); *In re: Grand Jury*, 286 F.3d 153, 157-158 (3d Cir. 2002). "In the vast majority of cases, a protective order should yield to a grand jury subpoena." *In re: Grand Jury*, 286 F.3d at 162; see *id.* at 163 ("We cannot overemphasize that the presumption we announce today in favor of a grand jury subpoena may only be rebutted in the rarest and most important of cases."); accord *Roach*, 138 F.3d at 445 ("In the end, society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh its interest in the resolution of a civil matter between private parties, * * * and thus, a civil protective order ordinarily cannot be permitted to sidetrack a grand jury's investigation.") (internal citations omitted).

In fact, the government is aware of no case in those circuits where the presumption was rebutted and the grand jury subpoena was not enforced. Thus, the First and Third Circuits' rule that grand jury subpoenas "almost always" overcome protective orders, *In re: Grand Jury*, 286 F.3d at 160, has been indistinguishable in practice from the nominally more categorical approach taken by the Fourth, Ninth, and Eleventh Circuits.

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subpoena enforceable in the case before it, that court said that "[t]here is no allegation in this case of such an improper purpose." *Ibid.*

In any event, petitioners marshal no support from decisions of the First or Third Circuits for the proposition that those courts would find any "exceptional circumstances" in this case that would justify non-enforcement of the subpoenas. The "exceptional circumstances" test would permit enforcement of a civil protective order against a grand jury subpoena only "in the exceptional case in which the public interest demands that the civil litigation take priority over any criminal investigation." *In re: Grand Jury*, 286 F.3d at 162; see *id.* at 163 ("[O]nly in cases in which the public interest in resolving the civil litigation is overwhelming should courts consider overriding a grand jury subpoena."). While petitioners make various policy arguments based on the foreign origin of the subpoenaed documents, see pp. 22-26, *infra*, petitioners make no attempt to explain how the public interest in facilitating civil antitrust litigation takes precedence over the grand jury's criminal antitrust investigation, and it does not, see pp. 16-19, *infra*.

b. In some circumstances, the Second Circuit takes a different approach to analyzing the enforceability of a grand jury subpoena for materials covered by a protective order, but that difference is not implicated here.[12] The

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[12] Contrary to petitioners' claims, Pet. 20; Nossaman Pet. 19-20, *SEC v. Merrill Scott & Associates, Ltd.*, 600 F.3d 1262 (2010), does not indicate that the Tenth Circuit will adopt the Second Circuit's position on the issue presented. In *Merrill Scott & Associates*, a plaintiff, the SEC, violated protective orders by sharing a person's confidential information, through the United States Attorney's Office, with the IRS. *Id.* at 1272. After that violation, the district court essentially modified the orders to permit retroactively this sharing despite the person's "justified reliance" on the orders' plain language to prevent that sharing. Citing *Maxwell II v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), the court of appeals concluded that the district court could not so easily modify the protective order. *Id.* at 1272-1273. The

Second Circuit would have enforced the grand jury subpoenas in this case for two independent reasons: petitioners do not claim that they or their clients provided deposition testimony in reliance on the protective order, and any such reliance would have been unreasonable because, among other reasons, the protective order was limited to the pretrial stages of litigation and did not prevent disclosure to state attorney generals for their own antitrust enforcement efforts.

In *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), "deponents [had] testified in reliance upon [a] Rule 26(c) protective order, absent which they may have refused to testify." *Id.* at 296. In that situation, the Second Circuit held that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, * * * a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government." *Ibid.*[12] At the same time, the court noted that "[t]he reliance of a private party upon protection of pre-existing documents from disclosure to the Government would normally be more difficult to justify than that of a witness who would, ab-

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decision does not suggest a protective order would preclude enforcement of a compulsory process, let alone a grand jury subpoena. And it does not indicate that the Tenth Circuit will follow the Second Circuit's decision in *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d at 1223, and apply the *Martindell* presumption in the grand jury subpoena context. The Tenth Circuit did not cite that 1991 decision nor any other circuit's decision addressing whether a grand jury subpoena overcomes a protective order.

[12] *Martindell* did not involve a grand jury subpoena, see 594 F.2d at 296 n.6, but the Second Circuit subsequently applied the *Martindell* presumption to a grand jury subpoena in *In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, supra.

sent the protective order, have invoked his privilege and given no testimony at all.'" *Id.* at 297 n.8.

In subsequent cases, the Second Circuit has clarified that the *Martindell* presumption comes into play only when a party reasonably relies on a protective order in providing deposition testimony. Thus, in *United States* v. *Davis*, 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983), the court found *Martindell* inapplicable (and affirmed enforcement of a grand jury subpoena) where "there [was] no indication that [a witness] agreed to testify only in reliance on [an] 'understanding'" of confidentiality and where many records sought "existed prior to the advent of the litigation." *Id.* at 422, 423. And in *SEC* v. *TheStreet.com*, 273 F.3d 222 (2d Cir. 2001), the court held that "the rule of *Martindell* * * * was not applicable" where the party seeking to block access to evidence covered by a protective order "did not at any time contend that [deponents] had reasonably relied on the [protective order] in giving their [c]onfidential [t]estimony." *Id.* at 234-235.[14]

Moreover, the Second Circuit has made clear that reasonable reliance is not established—and the *Martindell* presumption is thus inapplicable—when a protective order is "on [its] face temporary or limited." *TheStreet.Com*, 273 F.3d at 231. In *In re Agent Orange Product Liability Litigation*, for example, the court held that the presumption did not apply because the appellants "could not have relied on the permanence of the protec-

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[14] In *Minpeco S.A.* v. *CFTC*, 832 F.2d 739 (2d Cir. 1987), the court applied the *Martindell* presumption in a case apparently involving pre-existing documents, but that decision involved an administrative subpoena from an agency, not a grand jury, and in any event, it came before the Second Circuit clarified in *TheStreet.com* that the presumption rested on a reliance rationale. 273 F.3d at 234-235.

tive order" since the order "by its very terms was applicable solely to the pretrial stages." 821 F.2d 139, 147 (2d Cir.), cert. denied, 484 U.S. 953 (1987); see also *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 n.7 (2d Cir. 2004) (concluding "there [was] no presumption against access" because "the Bank could not have reasonably relied on the [protective order] because it was explicitly temporary").

In light of these significant limitations on the *Martindell* rule, petitioners' attempt to quash the grand jury subpoena in this case would have failed in the Second Circuit for a number of independent reasons. As noted previously (note 6, *supra*), the subpoenas in this case sought principally pre-existing corporate documents not created in reliance on a protective order, which do not trigger the *Martindell* presumption even in the Second Circuit. See *TheStreet.com*, 273 F.3d at 234-235; *Davis*, 702 F.2d at 422. It is thus not surprising that, unlike those parties that have successfully resisted grand jury subpoenas in the Second Circuit, petitioners have failed to point to any deposition testimony responsive to the subpoenas that "would not even have existed but for [the civil protective order], upon which the [petitioners] apparently relied" in providing the testimony. *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985).

Deposition testimony (about illegal cartel agreements) would be responsive to only one narrow category of material covered by the subpoenas in this case. See note 6, *supra*. Petitioners, however, do not claim that any of their clients or employees provided any deposition testimony responsive to that request in reliance on the protective order in this case. In fact, all of the "merits" witnesses from AUO and White & Case's clients invoked their Fifth Amendment privilege against compelled self-

incrimination in their merits depositions in the civil case.[16] The witnesses' invocation of the privilege is not surprising, given that those merits depositions took place when petitioners were fully aware that the United States was seeking civil discovery material for use in its criminal investigation.[16] In sum, there was no reasonable reliance on the protective order to provide potentially incriminating testimony in this case, nor could there have been.[17]

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[15] Petitioners express concern that reliance on the Fifth Amendment, rather than a protective order, is not a good option for deponents because of "the potentially ruinous adverse inferences that can follow from an assertion of the Fifth Amendment." Pet. 26. Petitioners here, however, secured an order from the district court allowing witnesses "to revoke the assertion of privilege" before trial and testify at a new deposition. Gov't C.A. E.R. 203. The order preserved the right of plaintiffs to request an adverse inference instruction, *id.* at 204, but the right to a do-over deposition without invocation of the privilege would seem to make such an instruction less likely. In any event, as discussed below, a civil protective order does not allow witnesses to avoid this dilemma. See pp. 18-19, *infra*.

[16] All but one of the AUO merits depositions took place in November 2009, four months after the United States asked the district court to modify its civil protective order to permit it to copy material for the grand jury. (The other AUO merits deposition took place almost a year later, in September 2010.) The merits depositions of White & Case's clients took place in November 2010, nearly a year after the grand jury subpoenas had been served and while the United States' appeal of the district court decision to quash was pending. Petitioners do not suggest that there was any testimony responsive to the subpoena in the non-merits depositions, *i.e.*, those concerning class certification, and, in any event, White & Case's clients agreed to provide those transcripts to the Antitrust Division voluntarily. Gov't C.A. E.R. 20.

[17] Petitioners do not make any Fifth Amendment claim with respect to the pre-existing corporate documents sought by the subpoenas, nor could they. Corporations have no right against compelled self-incrimination under the Fifth Amendment. *Doe v. United States*, 487 U.S. 201, 206 (1988), and, in any event, pre-existing, voluntarily prepared bus-

Petitioners' claim would have failed in the Second Circuit for a second reason: the civil protective order in this case "on [its] face" was both "temporary" and "limited." *TheStreet.com*, 273 F.3d at 231. The protective order excluded from its terms "presentations of evidence and argument at hearings on dispositive motions and at trial." Gov't C.A. E.R. 48, 60. The Second Circuit has held that "reliance" on a protective order "applicable solely to the pretrial stages of the litigation" is "misplaced." *TheStreet.com*, 273 F.3d at 231 (quoting *Agent Orange*, 821 F.2d at 147). The protective order here thus would have been categorically ineligible for the *Martindell* presumption.

Moreover, the protective order was "limited" (*TheStreet.com*, 273 F.3d at 231) in that it "does not and was not intended to interfere with any lawfully issued *State* subpoena or civil investigative demand."[15] Accordingly, state attorneys general could subpoena the documents and use them to enforce their own antitrust statutes. Petitioners thus could have had no reasonable expectation that the material covered by the protective order would be used only in the private civil litigation.

The protective order was additionally "limited" (*TheStreet.com*, 273 F.3d at 231) because it did not keep any information confidential from the United States. The district court had earlier granted the United States the right to review (but not copy) everything produced in discovery in the civil case. Gov't C.A. E.R. 47. It is difficult to understand why a witness with self-incrimination con-

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ness records are not covered by the privilege, *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984).

[15] Order Clarifying Stipulated Protective Order 1-2, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. May 4, 2010) (emphasis added).

cerns would reasonably choose to provide testimony he knew that federal prosecutors could read.

Finally, while petitioners, their clients, and other foreign companies may have reasonably relied on the protective order to limit voluntary disclosures by the civil plaintiffs and defendants (who were parties to those orders), they could not have reasonably relied on that order, whatever its terms, to protect those documents from grand jury subpoenas in the Northern District of California. Since 1995, the Ninth Circuit rule has been that grand jury subpoenas, "as a matter of course, prevail over a protective order." *Meserve*, 62 F.3d at 1226. As a result, the reliance rationale of *Martindell* and its presumption are inapplicable here for that reason as well.

2. The court of appeals' decision is correct and is consistent with decisions of this Court recognizing the broad scope of the grand jury's authority to obtain relevant evidence. "[R]ooted in long centuries of Anglo-American history," the grand jury "is a constitutional fixture in its own right." *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (brackets in original; internal quotation marks and citations omitted). It "occupies a unique role in our criminal justice system," as "an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 297 (1991).

As this Court has noted, "the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen." *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The broad "scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). The grand jury's "task is to inquire into the exis-

tence of possible criminal conduct and to return only well-founded indictments." *Branzburg*, 408 U.S. at 688. Its "investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Id.* at 701 (citation omitted). As a result, its "investigative powers are necessarily broad." *Id.* at 688; see also *Calandra*, 414 U.S. at 344 ("The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.").

Thus, "[a]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, * * * is particularly applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688 (citations omitted). Accordingly, while "[o]ver the years" this Court has "received many requests to exercise supervision over the grand jury's evidence-taking process," it has "refused them all." *Williams*, 504 U.S. at 50; see *Calandra*, 414 U.S. at 343.

The Ninth Circuit's conclusion that grand jury subpoenas are enforceable notwithstanding the existence of a civil protective order (even in situations, unlike this case, where potentially incriminating deposition testimony is involved) is consistent with this Court's understanding of the broad scope of the grand jury's investigative function. The contrary position—that materials can be provided to private class action antitrust plaintiffs but withheld from a federal grand jury—turns on its head the settled principle that "it is the Attorney General * * * who [is] primarily charged by Congress with the duty of protecting the public interest under the[] [antitrust] laws" and that pri-

vate actions merely "supplement[] government enforcement of the antitrust laws." *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

As an initial matter, if a civil protective order is permitted to shield information from a grand jury, it "may seriously impede a criminal investigation." *In re Grand Jury Subpoena*, 836 F.2d at 1475; accord *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1017 (11th Cir. 1993). "Uncoerced testimony given in a civil action may provide important and relevant information to a grand jury investigation." *In re Grand Jury Subpoena*, 836 F.2d at 1475. Moreover, "protective orders may cause the absurd result of shielding deponents from prosecutions for perjury because * * * the protective order itself impedes an investigation that might lead to cause for believing that perjury has occurred." *Ibid.* Nothing in Federal Rule of Civil Procedure 26(c) or its advisory notes "support[s] the notion that Congress, in passing on and enacting the Rule, intended to circumscribe the grand jury's authority and subpoena power." *In re Grand Jury Proceedings (Williams)*, 995 F.2d at 1017.

Second, permitting a protective order to defeat a grand jury subpoena would, as a functional matter, constitute an attempt to create a "*de facto* grant of immunity." *In re Grand Jury Subpoena*, 836 F.2d at 1475. Yet grants of immunity are the exclusive prerogative of the Executive Branch. See *ibid.*; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983) ("No court has authority to immunize a witness. That responsibility * * * is peculiarly an executive one.").

Third, while allowing a protective order to thwart a grand jury subpoena would have the definite effect of impeding the grand jury's investigation, the civil-litigation benefits of doing so are far from certain. While it has

been suggested that a protective order will make civil deponents less likely to invoke their Fifth Amendment privilege, "an individual may not totally rely on judicial protection against the use of incriminating information without a grant of immunity." *In re Grand Jury Subpoena*, 836 F.2d at 1476; see *Andover Data Servs. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1084 (2d Cir. 1989) ("a court in a civil action is simply without the means to fashion a sufficiently durable safeguard for the full protection of the [F]ifth [A]mendment rights of a reluctant non-party witness").

Material subject to a protective order can leak; the protective order can be modified to permit disclosure; and material protected pre-trial may be disclosed at trial. *In re Grand Jury Subpoena*, 836 F.2d at 1476; see *In re Grand Jury Proceedings (Williams)*, 995 F.2d at 1019 n.14. Even under the *Martindell* approach, testimony provided pursuant to a protective order can be divulged to a grand jury if the government establishes a "compelling need" or "extraordinary circumstances." *Ibid.* Finally, courts have "available other tools to ensure successful resolution of a civil action which is threatened by a deponent's privileged silence," such as delaying discovery until completion of the grand jury investigation, using "traditional rules of burden-shifting," *In re Grand Jury Subpoena*, 836 F.2d at 1476-1477, or, as in this case, permitting witnesses who have invoked their Fifth Amendment privilege at a deposition the opportunity to revoke that invocation later and testify, see note 15, *supra*.[19]

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[19] As discussed in the text, a civil protective order is not an adequate substitute for a witness's invocation of his Fifth Amendment privilege against self-incrimination. Accordingly, the concern that the government expressed in its motion to stay discovery in the civil case about employees' being put in the "untenable position of having to choose be-

3. The question of how and when grand jury subpoenas can require production of material covered by civil protective orders rarely arises. After the Ninth Circuit decided *Meserve* 16 years ago, it did not have occasion to address the issue again until this case. Several other circuits that have addressed the question have done so only once, the most recent decision coming nine years ago.[20] The lengthy list of civil cases with parallel criminal investigations provided by petitioner White & Case, Pet. 24-26, underscores this point. Despite the frequency of such parallel litigation, the question presented here arises only rarely.

In most cases, the government serves grand jury subpoenas and obtains the evidence it needs long before discovery in any related civil case has advanced very far.

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tween asserting their Fifth Amendment right against self-incrimination, with the negative inference that comes with that decision, or testifying in the deposition and running the risk of self-incrimination in the criminal matter" (Gov't C.A. E.R. 40) does not support petitioners here. As argued in the motion in which that statement appeared, the way to avoid such concerns would be to stay discovery; absent such a stay, employees would encounter such a dilemma with or without a civil protective order.

[20] The Fourth Circuit has not issued another opinion addressing the issue since its first and only one in *In re Grand Jury Subpoena*, *supra*, in 1988. Likewise, the Eleventh Circuit has not had occasion to address the question again since its 1993 decision in *In re Grand Jury Proceedings (Williams)*, *supra*; the First Circuit since its 1998 decision in *In re Grand Jury Subpoena (Roach)*, *supra*; and the Third Circuit since its 2002 decision in *In re Grand Jury*, *supra*. Although the Second Circuit has had more recent occasion to discuss the *Martindell* presumption, see, *e.g.*, *SEC v. TheStreet.com*, *supra*, it has not had a case involving a federal grand jury subpoena and a protective order since 1991, see *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, *supra*. The issue has not arisen in the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits.

Indeed, the government occasionally seeks to delay civil discovery that might interfere with an ongoing criminal investigation, as it did in this case. See p. 3, *supra*; see also *In re Grand Jury Subpoena*, 836 F.2d at 1476 (courts "commonly * * * delay discovery until a pending grand jury investigation has been completed"). Thus, the government's need to serve a grand jury subpoena seeking the fruits of civil discovery arises infrequently.

Moreover, petitioner White & Case's claim, echoed by various amici curiae, that review is necessary because the per se rule encourages civil plaintiffs to make "overly broad discovery requests [that] will expose defendants to greater risks in a parallel criminal investigation" to gain leverage in the civil action, Pet. 27, lacks merit. White & Case's concern appears to be that plaintiffs' use of discovery to obtain evidence supporting their civil antitrust claims for price fixing threatens to uncover evidence of price fixing that might result in a criminal prosecution. Such a concern provides no reason to grant review, let alone to keep evidence out of the grand jurors' hands. *Branzburg*, 408 U.S. at 696.

Equally unfounded is the claim that the different approaches among the circuits tempts "plaintiffs and prosecutors to forum shop." Pet. 27; Br. of Amici Curiae Chamber of Commerce of the United States of America and DRI—The Voice of the Defense Bar 9-10. In fact, the Department of Justice continues to investigate and prosecute international cartels in circuits that do not apply the per se rule. See, *e.g.*, *Stolt-Nielsen, S.A.* v. *United States*, 442 F.3d 177 (3d Cir.) (grand jury investigation of international conspiracy to fix prices of parcel tanker shipping services), cert. denied, 549 U.S. 1015 (2006); *United States* v. *Taubman*, 297 F.3d 161 (2d Cir. 2002) (per curiam) (criminal prosecution of international conspiracy

to fix prices of auction commission rates). And even though the difference in approach among the circuits has existed for at least 20 years, petitioners cite no examples of the United States' impaneling a grand jury in one of the "per se" circuits in order to make it easier to enforce grand jury subpoenas. Finally, the circuits' approaches to this question provide no incentive for private plaintiffs to forum shop because a motion to quash a grand jury subpoena is made where the grand jury is empaneled, regardless of where the civil protective order was entered. Fed. R. Crim. P. 17(c)(2); *United States* v. *(Under Seal)*, 714 F.2d 347, 350 (4th Cir.), cert. dismissed, 464 U.S. 978 (1983).

4. Petitioners' remaining arguments provide no basis for review by this Court.

Petitioners contend that the analysis of the relationship between the protective order and the grand jury subpoenas should have been different because the evidence in question originated abroad. Nossaman Pet. 23; see Pet. 29-34. Other than the court of appeals decision in this case, however, no other circuit has considered that novel question, accord Amicus Br. of NACDL, et al. 11, and further consideration by the courts of appeals would be warranted before this Court addressed it. In any event, the decision below does not conflict with or circumvent settled principles governing the geographic reach of grand jury subpoenas.

While search warrants have specific territorial limits—with some exceptions, they can authorize searches and seizures only of persons and property located within the district of the issuing judge, see Fed. R. Crim. P. 41(b)—grand jury subpoenas do not. The only "geographic limit" on the grand jury is that its subpoena cannot be *served* on non-resident aliens outside the United

States. Fed. R. Crim. P. 17(e); 28 U.S.C. 1783. But neither that limit nor petitioners' proposed principle limiting the subpoena power to documents within the United States was violated in this case. The subpoenas sought documents located within the United States and in the custody or control of the U.S. law firms who were served with subpoenas in the United States.

A grand jury subpoena is simply a command directed to a person to appear before the grand jury and testify or produce evidence under the person's control. Thus, the grand jury's subpoena power does not turn on where the evidence originated or even where it is currently located. Rather, "[t]he test for the production of documents is control, not location." *In re Grand Jury Subpoena Directed to Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); accord *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 828-829 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *In re Grand Jury Subpoena Addressed to First Nat'l City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968) ("a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material.").[21]

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[21] The decision below does not implicate *Commodity Futures Trading Commission* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984), or Sections 274-278 of the *United States Department of Justice's Criminal Resource Manual* (1997), as petitioners claim, see Nassaman Pet. 23. *Nahas* involved service of an administrative subpoena on a foreign citizen in a foreign nation, 738 F.2d at 493, and the cited sections of the government manual describe methods, including subpoenas, to obtain evidence located abroad. Neither is relevant here because the holding below is that the grand jury, via subpoena, can command United States law firms served in the United States to produce evidence in the United States under their control. Pet. App. 2a-3a.

Nor does the rule applied by the Ninth Circuit in this case have "serious implications under the foreign sovereignty and international-comity principles that dictate the limitations on the government's extraterritorial subpoena power," Pet. 31, or allow the government to "ignore * * * settled methods for seeking foreign-based discovery." Nossaman, Pet. 24.[7] The subpoenaed documents are in the United States and under the control of U.S. law firms served in the United States. Under these circumstances, considerations of foreign sovereignty and international comity are, at most, *de minimis*. The United States, as a sovereign, is entitled to obtain and use evidence within its own territory without the consent of foreign governments. The availability of letters rogatory or treaty requests to attempt to obtain foreign-located duplicates of the documents that are in the United States does not render those means mandatory or invalidate other valid means, like the subpoena power, to compel a "party subject to [the court's] jurisdiction to produce evidence." *Société Nat'l Indus. Aérospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987); cf. *id.* at 539-540 (holding that the Hague Convention for obtaining evidence abroad did not preempt court's authority to order a "party before it to produce evidence physically located within a signatory nation").

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[7] The Nossaman petitioners' claim that the district court quashed the subpoena, "in large part, out of concern over the impact of such a precedent on foreign sovereignty," Nossaman Pet. 24-25, is unsound. While the district court noted petitioners' contentions about the interests of foreign sovereigns, it did not quash the subpoena on that basis but rather found it "more prudent to quash the subpoenas and allow the DOJ to raise these issues on appeal to the Ninth Circuit," given what it perceived as an absence of authority on the scope of the grand jury's authority in this situation. Pet. App. 2a-3a; see Pet. Sealed App. 6.

In any event, any comity questions should be deemed resolved when the Executive Branch, through the Department of Justice, proceeds with a subpoena for foreign business records that have been brought to the United States. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is the 'sole organ of the federal government in the field of international relations,' * * * and [it] has ample authority and competence to manage 'the relations between the foreign state and its own citizens' and to avoid 'embarass-[ing] its neighbor[s].'") (brackets in original and citations omitted). There is no basis for a district court to second-guess that judgment.[23]

Petitioner White & Case suggests that the decision will disturb relations between the United States and the European Union (EU) or Japan by "giv[ing] U.S. prosecutors *carte blanche* to pierce protective orders to obtain [European Commission (EC) or Japanese] leniency materials produced in civil discovery that the *prosecutors* would not be able to obtain directly from foreign regulators (absent the consent of the self-reporting company)." Pet. 36; see Br. of Amicus Curiae Japan Competition Law Forum 3, 13-14. But the United States has long emphasized the importance of confidentiality to a successful anti-cartel leniency program.[24] Indeed, the United States

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[23] To date, no foreign government has voiced any concerns about the subpoenas at issue in this case.

[24] See, *e.g.*, Letter from Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, to James C. Owens 3 (Oct. 6, 2009) (Attachment No. 6 to Mot. for Recons. re 185 Order on Mot. to Compel by European Commission, *In re: Flat Glass Antitrust Litigation (II)*, No. 08-mc-180, MDL No. 1942 (W.D. Penn. Oct. 8, 2009) (ECF No. 200) ("Confidentiality is one of the hallmarks of leniency programs, and a lack of confidentiality is a

has supported EU efforts to protect its confidential leniency materials from disclosure in civil discovery because "harm to the EC leniency program could result in harm to the Division's ability to detect and successfully prosecute international cartels that target U.S. businesses and consumers" because "[i]f companies that have dual exposure in the United States and the European Union are dissuaded from applying for leniency with the European Commission, then they may also choose not to apply for leniency in the United States, especially if they have greater exposure in the European Union."[7]

Accordingly, petitioner's suggestion that the United States would suddenly change its views on confidentiality, impair the EC or Japanese leniency program to the detriment of its own program, and jeopardize its close working relationship with the EU and Japan is without merit. In any event, companies involved in international price fixing that seek leniency typically do so in every country in which they can, including the United States. Such concurrent leniency applications result in the disclosure of all relevant information to the United States without any need to examine what those companies may have told other antitrust authorities.

The decision below does not improperly limit the court's discretion under Rule 17(c)(2), which allows the court to "quash or modify the subpoena if compliance would be unreasonable or oppressive," Fed. R. Crim. P. 17(c)(2). Nossaman Pet. 25-28. Nothing in the court of appeals decision limits the district court's traditional discretion under Rule 17. Rather, the court of appeals merely applied its prior decision in *Meserve* holding that

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major disincentive for leniency applications.")).

[7] *Id.* at 4.

the existence of a protective order alone does not make compliance unreasonable or oppressive. See *Meserve*, 62 F.3d at 1226.[26]

The Nossaman petitioners erroneously suggest that the subpoenas are unreasonable or oppressive because they were directed to lawyers. Nossaman Pet. 27-28. The grand jury appropriately directed its subpoenas to the law firms that had custody and control of the non-privileged documents produced to the multitude of parties in the civil action. The cited provision of the United States Attorney's Manual (USAM) applies only to attorney subpoenas seeking "information relating to the attorney's representation of a client." USAM § 9-13.410(B) (2009). The subpoenas here seek information that was produced in discovery, not information bearing on the representation of a client. *United States* v. *Perry*, 857 F.2d 1346 (9th Cir. 1988), and *United States* v. *Bergeson*, 425 F.3d 1221 (9th Cir. 2005), involved subpoenas served post-indictment on the criminal defendants' trial counsel seeking information about the attorney's representation of that client, specifically who was paying the fees and what trial date the attorney told the client. 857 F.2d at 1347-1348; 425 F.3d at 1222-1223. In *Perry*, the subpoena was issued under circumstances that "strongly suggest[ed] an improper motive," 857 F.2d at 1348, and in *Bergeson*, the "attorney-client relationship * * * would be

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[26] Nor is there any rule barring a grand jury or criminal investigation's use of evidence that was produced in civil discovery. Cf. Nossaman Pet. 29. As this Court recognized in *United States* v. *Kordel*, 397 U.S. 1, 11-12 (1970), where civil discovery mechanisms are used in good faith and not "solely to obtain evidence for [a] criminal prosecution," there is nothing inappropriate, let alone unlawful, about the government's use of information produced by those mechanisms in a criminal investigation and prosecution.

destroyed" if the subpoena forced counsel to testify, 425 F.3d at 1223.

Here, the government acted in good faith, Pet. App. 3a, and no risk is posed to the attorney-client relationship. Similarly, the concern expressed by Amicus Curiae American Bar Association about "compel[ling] a lawyer to produce client information" and the need "to maintain a client's confidences" (Br. for The Am. Bar Ass'n at 3) is misplaced in this case. All of the documents at issue have already been disclosed (or will be disclosed) to the civil plaintiffs who seek millions of dollars in damages from the attorneys' clients.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-1147

IN THE

Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari, pursuant to Supreme Court Rule 29.6, remains accurate.

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REPLY TO BRIEF IN OPPOSITION

DOJ concedes that the circuits take "different" approaches to resolving the question presented. Opp'n 7, 8, 10. This concession is unavoidable because the circuits themselves have expressly acknowledged the three-way circuit split (Pet. 17-22), and numerous commentators have confirmed its persistence (Pet. 20, 23). Indeed, a committee of the Judicial Conference of the United States recently acknowledged the split: "[On] whether a grand jury subpoena can trump a protective order entered in civil litigation, the circuits have split as to the proper approach." Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Case Law on Entering Protective Orders, Entering Sealing Orders, and Modifying Protective Orders*, at 14 n.2 (2010) (providing lengthy analysis of CA3, CA1, CA9, CA2, CA11, and CA4), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

DOJ nonetheless seeks to downplay the significance of the circuit split, arguing that the outcome of this case would have been the same in any of the relevant circuits. While predicting what other circuits would have done is an inexact exercise, there is substantial reason to believe that the First and Third Circuits, and certainly the Second, would have affirmed here, while the Fourth and Eleventh would have reversed, as the Ninth did.

I. THE THREE-WAY CIRCUIT CONFLICT IS EXPRESS AND IMPLICATED SQUARELY IN THIS CASE.

The Federal Rules vest district courts with discretion both to enter protective orders and to

quash grand jury subpoenas. Pet. 2-4. When these discretionary powers intersect, the *per se* circuits purport to *divest* district courts of any discretion whatsoever, requiring them to automatically accord primacy to grand jury subpoenas. The First, Third, and Second Circuits, in contrast, preserve judicial discretion to consider relevant circumstances, but establish opposing presumptions to guide the analysis. While the Ninth Circuit here condemned the district court's circumstantial analysis, the First, Third, and Second Circuits would have endorsed it.

A. The District Court's Order Quashing the Subpoenas Would Have Been Affirmed in the First and Third Circuits.

DOJ argues that "petitioners marshal no support from the decisions of the First or Third Circuits for the proposition that those courts would find any 'exceptional circumstances' in this case that would justify non-enforcement of the subpoenas." Opp'n 10. But DOJ ignores the exceptional circumstances expressly relied upon by the district court for that outcome. Pet. 12-13, 29-30.

The district court focused on several circumstances that it expressly found required an exception from the Ninth Circuit's *per se* rule, including: (i) the *causal relationship* between DOJ's grand jury investigation and the follow-on Class Actions, whose discovery brought foreign documents into the United States that DOJ otherwise could not obtain by grand jury subpoena; and (ii) DOJ's failure to exhaust or even attempt *other alternatives* to obtain the materials. Sealed App. 6; *see also* Pet. 30.

The district court also observed that, although there was no government misconduct here, there are nonetheless serious public-interest concerns with prosecutors obtaining foreign evidence beyond the grand jury subpoena power from concededly follow-on civil actions: "the Court is concerned about the potential for abuse in other cases." Sealed App. 6 n.1.

Thus, the district court undertook a comprehensive circumstantial analysis consistent with Rule 17(c)(2) and this Court's observations on that rule. *See R. Enters.*, 498 U.S. at 299 ("[W]hat is reasonable depends on context."). The Ninth Circuit flatly rejected the district court's circumstantial basis for quashing the subpoenas. App. 3a ("[W]e apply our per se rule that a grand jury subpoena takes precedence over a civil protective order."). But the First and Third Circuits would have embraced that analysis.

The First Circuit identified the conflict between the Second Circuit and *per se* circuits, and expressly rejected each of those ends of the spectrum in favor of an intermediate, third rule, which presumes that grand jury subpoenas trump civil protective orders—but provides judges discretion to rule otherwise. *Roach*, 138 F.3d at 444 (1st Cir. 1998) ("Turning first to *Martindell*, we believe that its creation of a presumption favoring the sanctity of civil protective orders tilts the scales in exactly the wrong direction."); *id.* at 445 ("Because th[e] per se rule obviates all analysis, it will trench upon legitimate concerns when (even if rarely) a solid case can be made for exceptional treatment.").

The Third Circuit followed suit, likewise rejecting the Second Circuit and *per se* rules and exalting judicial discretion. *In re Grand Jury*, 286 F.3d at 163 (3d Cir. 2002) ("[W]e do not wish to eliminate any possibility of a court exercising its discretion in an extraordinary case.").

DOJ tries to dismiss this express divergence as merely semantic. Opp'n 9. But the First/Third Circuit rule is purposefully different from the *per se* rule in preserving a district court's discretion to evaluate circumstances. The factors announced by the First/Third Circuits in their "exceptional circumstances" test validate the circumstantial inquiry conducted by the district court here, particularly the district court's focus on DOJ's failure to pursue letters rogatory or other established methods. *See* Pet. 22 (quoting CA1/CA3 factors, including "government's need" and "availability of other sources").

The district court here could not have been more explicit in its discussion of the exceptional circumstances warranting departure from the Ninth Circuit's *per se* rule, and the government need/alternative sources circumstances identified by the district court top the list of "exceptional circumstances" factors in the First/Third Circuits. The Ninth Circuit reversed the district court for an analysis and outcome that fit neatly within the First/Third Circuits' circumstantial test.

B. The District Court's Order Quashing the Subpoenas Would Have Been Affirmed in the Second Circuit.

Before the Ninth Circuit, DOJ candidly conceded that "the Second Circuit has a contrary rule." Gov't C.A. Reply Br. 1 n.1. DOJ nonetheless posits for the first time now that the Second Circuit would have enforced DOJ's subpoenas because (i) the Second Circuit rule purportedly applies only to deposition testimony provided in reliance on a protective order, and (ii) the protective order here supposedly could not have been relied upon due to provisions allowing for "review" by DOJ and disclosure to state attorneys general or potentially at trial. Opp'n 11-16. Both attempts to distinguish the Second Circuit rule fail.

The Second Circuit's rule is *not* limited to deposition testimony, and has been applied to documents under protective order. In *Davis*, 702 F.2d 418 (2d Cir. 1983), the Second Circuit declined to apply *Martindell* as to deposition testimony, because there was no protective order over the deposition, but applied *Martindell* as to the documents, which were covered by a protective order: "A court may direct access to such material upon a proper showing of need. Here such a showing was amply demonstrated." *Id.* at 423. DOJ cites *Davis* but ignores these crucial aspects. Opp'n 12-13.

In *Palmieri*, 779 F.2d 861 (2d Cir. 1985), the Second Circuit reversed the district court's enforcement of a state grand jury subpoena for documents subject to protective order because the district court failed to undertake the *Martindell* inquiry: "we hold that the district court erred in not

expressly ascertaining whether the state had met its burden of proof under that test." *Id.* at 864. *Palmieri* observed that "the very papers and information that the Attorney General seeks apparently would not even have existed but for the sealing orders . . . ." *Id.* at 865. The district court here similarly recognized defendants' reliance on the protective order when compelled to produce overseas documents that otherwise would have been beyond DOJ's grand jury subpoena power. Pet. 30; *see also* Nat'l Ass'n of Mfrs.' Amicus Br. 12 n.7 (quoting transcript of Special Master hearing yielding the R&R adopted by the district court: "I am troubled by this idea that [a defendant] on the one hand can be ordered to bring this stuff into the United States, and then the Government can say, ah-ha you brought it in, now we gotcha.").

Thus, DOJ's refrain that parties cannot rely on a protective order over "pre-existing documents" ignores that *foreign* documents would not be subject to a grand jury subpoena but for production in follow-on civil discovery in reliance upon a protective order. DOJ, which argued to the Ninth Circuit that the defendants "made a choice" to produce the overseas documents rather than violate the district court's order (Gov't C.A. Br. 34), cannot now dispute that defendants relied upon the protective order in making that choice.

DOJ concedes that *Minpeco*, 832 F.2d 739 (2d Cir. 1987), "applied the *Martindell* presumption in a case apparently involving pre-existing documents," Opp'n 12 n.14, but attempts to distinguish *Minpeco* as civil rather than criminal enforcement. But DOJ itself repeatedly relies on *TheStreet.com*, a civil

enforcement case. (*TheStreet.com* merely held that the protective order in question could not provide confidentiality because the deponents had testified "at least a month *before* the entry of that order." 273 F.3d at 234.)

The Second Circuit's decisions in *Davis*, *Palmieri*, and *Minpeco* thus disprove DOJ's contention that the Second Circuit applies *Martindell* only to deposition testimony rather than documents. Furthermore, the comment in *Martindell* that "[t]he reliance of a private party upon protection of pre-existing documents from disclosure to the Government would *normally* be more difficult to justify than that of a witness who would, absent the protective order, have invoked his privilege and given no testimony at all[,]" 594 F.2d at 297 n.8 (emphasis added), is entirely consistent with the district court's explanation here of the special circumstances surrounding the production of overseas documents otherwise beyond the grand jury's reach in reliance on a protective order. (And, for all of DOJ's emphasis about deponents here asserting the Fifth Amendment, DOJ ignores that the deponents in *Martindell* did the same. *In re Grand Jury*, 836 F.2d at 1478 n.16.)

All told, the reliance identified by the district court along with its determination that DOJ did *not* need the protected discovery due to alternative sources, *e.g.*, Reply 2-3 *supra*, demonstrate that the district court's order falls squarely within the Second Circuit's *Martindell* presumption.

DOJ is similarly mistaken in arguing that any terms of the protective order here would remove it from the *Martindell* presumption. As to DOJ's ability

to "review but not copy" the overseas documents, DOJ ignores that from the outset the district court designed its orders to prevent the parallel civil discovery from being presented to the grand jury: "the United States shall be limited to reviewing access only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the . . . non-indicted foreign defendant[s] . . . ." Sealed App. 4; *see also* App. 14a ("[A]s long as copies of its foreign discovery are not available for presentation to the grand jury, the prejudice to defendants, if any, appears minimal.").

Thus, it was entirely consistent with the court's intentions that state attorneys general could access the documents—subject to the protective order—for *civil* enforcement. Opp'n 4 n.5 (DOJ conceding that the court expressly forbade access by DOJ while simultaneously granting access to State AGs); Report & Recommendation on Motions Seeking Clarification or Modification of Protective Order at 2, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Mar. 12, 2010) (ECF No. 1594) ("In making this recommendation, the Special Master is mindful of the fact that the States' subpoenas and civil investigative demands are civil and not criminal in nature . . . .") (adopted by district court).

As to supposed temporal limitations of the protective order, DOJ seizes upon a provision under which the district court shall revisit—not ignore—the application of the protective order at "hearings on dispositive motions and at trial." Gov't C.A. E.R. 60. But in this large MDL case there has never been any realistic prospect that any trial or dispositive evidentiary hearing would occur prior to the

expiration of the criminal statute of limitations. Furthermore, for more than two years the district court repeatedly rebuffed each of DOJ's attempts to pierce the protective order, each time protecting defendants' overseas materials that DOJ could not otherwise obtain by grand jury subpoena. Pet. 8-13. Under these circumstances, reliance upon the protective order was eminently reasonable, and would have been recognized as such by the Second Circuit.

II. THE QUESTION PRESENTED WARRANTS REVIEW.

Given the opposite outcomes that would have resulted in different circuits, DOJ's remaining arguments may be addressed briefly.

DOJ argues at some length that the Ninth Circuit decision "is correct" (Opp'n 16-19) but that argument is a mere rehashing of the rationale provided by the circuits adopting the *per se* approach. DOJ's argument merits little response at this stage, other than the observation that such rationale was rejected by the Second Circuit and acknowledged, but diverged from, in the First and Third Circuits. Furthermore, DOJ never attempts to reconcile the abrogation of discretion under the *per se* rule with the plainly contrary text of Criminal Rule 17(c)(2) or this Court's observations on that rule in *R. Enterprises*.

Even though the question presented has percolated up to no fewer than six circuit courts, some repeatedly, DOJ questions the frequency with which the issue arises. In fact, there is ample reason to believe that reported decisions result in only a

small fraction of the instances in which the issue arises. And, there is little reason to expect many reported decisions in the circuits where the rule has been reduced to common practice. Indeed, as discussed in the Petition, but ignored by DOJ, the Second Circuit's rule is enshrined in a practice manual, and more broadly, the split among the circuits has become a matter of hornbook law. Pet. 20, 23. Given other factors—including the disinclination of many corporate targets to challenge DOJ investigatory authority, negotiated resolutions to such disputes, and Criminal Rule 6(e)'s under-seal requirements—it is telling that the question presented has nonetheless resulted in reported decisions in nearly half of the circuits.

DOJ concedes the increasing frequency of parallel civil and criminal litigation in the modern legal world. Opp'n 20. If DOJ is successful in expanding the reach of grand jury power in this case, an emboldened DOJ is sure to do the same in other matters. Indeed, during the pendency of this appeal, another grand jury subpoena has been issued to obtain civil discovery materials in the Fourth Circuit, another *per se* circuit. *See* Mike Scarcella, *DOJ Defending Grand Jury Subpoenas in Trade Secrets Theft Investigation*, The Blog of LegalTimes (Mar. 22, 2011), http://legaltimes.typepad.com/blt/2011/03/doj-defending-grand-jury-subpoenas-in-trade-secrets-theft-investigation.html (discussing *In re: Grand Jury Subpoena*, No. 10-4815 (4th Cir.) (under seal)).

The breadth of *amicus curiae* support for the Petition also underscores that varied interests view the question presented as one of recurring importance.

DOJ, which admits to "occasionally" seeking to stay civil discovery to avoid interference with its investigations (Opp'n 21), is nonetheless dismissive of any concern that the rights of investigatory targets might be affected by civil plaintiffs using broad civil discovery rules to leverage the investigatory powers of the grand jury. Opp'n 21. Aside from failing to appreciate constitutional concerns and other mischief that would certainly arise from such deputizing of civil plaintiffs, DOJ ignores that such a broadening of investigatory powers ought to occur, if at all, from carefully considered rule-changing action rather than as a result of opportunistic exploitation of existing civil and criminal procedures.

As to forum shopping, DOJ cannot seriously dispute that it considers the law of the relevant circuits in assessing where to conduct an investigation. Pet. 27-28 (detailing DOJ manual permitting prosecutors to consider "potential difficulties in conducting grand juries" when deciding where to empanel grand juries). The ability to use a grand jury subpoena to obtain civil discovery could be decisive in particular circumstances. Contrary to DOJ's assertion (Opp'n 22), civil plaintiffs, too, may have incentives to forum-shop, as some civil courts—particularly in *per se* circuits—may entertain motions to quash grand jury subpoenas seeking civil discovery and others may choose to modify civil protective orders to permit a grand jury subpoena. *See, e.g.*, *United States v. Oshatz*, 700 F. Supp. 696, 699, 701 (S.D.N.Y. 1988) (noting that civil judge in E.D. Va. had modified protective order to permit grand jury subpoena in an effort to comply with Fourth Circuit

law, but quashing subpoena under Second Circuit law).

Finally, while DOJ seeks to minimize the significance of its use of subpoenas to obtain *foreign* documents (Opp'n 23-28), that circumstance featured prominently in the district court's conclusion that compliance with the subpoenas would have been "unreasonable or oppressive" under Rule 17(c)(2). DOJ emphasizes that the foreign documents were brought into the United States, but ignores that they were brought here under the district court's order in civil actions triggered by DOJ's own investigation. But for the follow-on civil actions, the documents would never have come within the reach of a grand jury subpoena, as the Toshiba entities owning and controlling the documents were not present or otherwise subject to *in personam* jurisdiction for grand jury subpoenas. Opp'n 22-23. Those entities were subject to *in personam* jurisdiction in the civil actions solely due to the Hague Convention. In the absence of piggybacking on the civil actions, DOJ could only have sought the foreign documents through the customary means of letters rogatory, treaties, or informal diplomatic requests.

Contrary to DOJ's assertion (Opp'n 25), the district court was within its discretion under Rule 17(c)(2) in considering that DOJ's circumvention of established methods could cause international friction. *See also Empagran*, 542 U.S. at 164 (emphasizing need to construe statutes "to avoid unreasonable interference with the sovereign authority of other nations"). That exercise of discretion, which in no way interferes with the Executive's conduct of foreign affairs, would have

been applauded in half of the six circuits to consider the question presented. The conflict among those circuits needs to be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

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UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Bar Association (ABA) respectfully submits this brief in support of the Petition for a Writ of Certiorari. The ABA requests that this Court resolve the conflict among the courts of appeals with respect to the question presented so as to provide clear and uniform guidance on an issue that is critical to the attorney-client relationship, that being the rules that are to be applied when a grand jury subpoena is served on an attorney for client information.

With nearly 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. The ABA's members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its voluntary membership includes lawyers in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, judges, law professors, law students, and non-lawyer associates

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief.

in related fields.[2]

The ABA's mission is "to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[3] One of the ABA's goals is to "promote competence, ethical conduct, and professionalism."[4] In furtherance of this goal, the ABA has devoted extensive research and effort to addressing the delicate balance between the public interest and protecting the attorney-client relationship. This work serves the interest of promoting both the rule of law and the right to free and unfettered assistance of counsel.

The ABA first addressed *per se* enforcement of grand jury subpoenas directed to attorneys for client information in February 1986. A policy adopted that year to protect the attorney-client relationship was thereafter revised in 1988, and has remained ABA policy since that time. Believing that the Petition for Writ of Certiorari that is now before the Court presents an issue that is similarly critical to an effective attorney-client relationship, the ABA respectfully requests that the Petition be granted so that lawyers and their clients may be guided by uniform and clear rules.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA.

[3] ABA Policy and Procedures Handbook 1 (2010-2011).

[4] *Id.*

SUMMARY OF THE ARGUMENT

The Ninth Circuit has adopted a *per se* rule that grand jury subpoenas always take precedence over civil protective orders, even where a prosecutor uses a grand jury's broad investigative subpoena power to compel a lawyer to produce client information. That ruling directly implicates an existing conflict among the circuit courts on an issue of great importance to the legal profession. The question presented moreover has significant potential to affect the trust and confidence that are the essential foundations of the attorney-client relationship.

The ABA has adopted policies against *per se* enforcement of subpoenas because of their potential to undermine the attorney-client relationship. Beyond information protected by the attorney-client privilege, a lawyer is obligated in the attorney-client relationship to maintain a client's confidences except as directed by the client in the course of the representation. The *per se* approach overrides this element of confidence by compelling the lawyer served with a subpoena to act contrary to the interests of the client without an inquiry as to whether the government has other available means for obtaining the information. Thus, clients under grand jury investigation may hold back important information from their lawyers out of fear that their counsel will be compelled to produce to the government information that was disclosed to the lawyer through the attorney-client relationship.

The ABA does not at this time take a position with respect to the merits of the question presented.

But because of the concerns that arise from the chilling effect that the *per se* rule can have on the flow of information between attorney and client, the ABA believes that the rules for enforcing subpoenas against lawyers merit review and elucidation by this Court. This Court's adoption of uniform rules also will ensure that lawyers and their clients will not face different rules in different jurisdictions when a lawyer is confronted with a grand jury subpoena for client information.

REASON FOR GRANTING THE WRIT

Enforcement of Grand Jury Subpoenas Against Attorneys for Client Information Has Important Ramifications for the Attorney-Client Relationship.

This case presents an important question – on which the Circuits have split in at least three directions – that has serious ramifications for the attorney-client relationship. The Ninth Circuit has declared that whenever, "[b]y a chance of litigation," documents that would otherwise be unavailable to the grand jury are "moved from outside the grasp of the grand jury to within its grasp" – because those documents are in a lawyer's hands – "a grand jury subpoena takes precedence over a civil protective order." App. 3a (citation omitted). That rule allows virtually indiscriminate use of grand jury subpoenas to compel lawyers to produce evidence to the government for use in a grand jury investigation of the lawyer's own client.

The ABA first adopted a policy against *per se* enforcement of subpoenas in 1986. Two years later, the ABA's Criminal Justice Section presented the ABA 1988 Midyear Report with Recommendation #122B to the ABA's House of Delegates (hereinafter, 1988 Report with Recommendation) (copy attached as appendix). The Report discussed the increased use of such subpoenas by federal prosecutors following the passage, *inter alia*, of the Comprehensive Crime Control Act's amendments to the federal RICO and Continuing Criminal Enterprise statutes. 1988 Report with Recommendation, Report at 9-11. These subpoenas were directed at information "on the size and source of the attorney's fees," for use in the forfeiture of the fees paid to attorneys. *Id.* at 11.

The ABA House of Delegates, in response, adopted the 1988 Recommendation as policy, and it has been ABA policy since that time.[5] This policy urges that, "where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship ..., the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney without prior judicial approval after an opportunity for an adversarial proceeding." 1988 Report with Recommendation, Recommendation at 1.

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[5] Recommendations become official ABA policy upon adoption by vote of the ABA House of Delegates, which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the United States Attorney General, among others. *See* ABA General Information, http://www.abanet.org/leadership/delegates.html (last visited April 10, 2011).

The policy also urges that judicial approval be withheld unless the court finds: (i) "the information sought to be produced is not protected by privilege"; (ii) "the evidence ... is essential to the successful completion of an ongoing investigation and prosecution and is not merely peripheral, cumulative or speculative"; (iii) the information is described with particularity and "is directed at information regarding a limited subject matter and a reasonably limited period of time"; (iv) the subpoena is not being used to harass the attorney or client; and (v) "the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information." *Id.* at 1-2.

The ABA's policies were designed to balance protecting the attorney-client relationship from unnecessary intrusion with the legitimate needs of the grand jury for the production of relevant evidence. As stated in the 1988 Report:

> Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and his attorney.... A subpoena rule which does no more than recognize the attorney-client privilege, however, will ignore other important aspects of the relationship between a client and ... attorney.... Because information protected by the attorney-client privilege is not coterminous with information

> which an attorney acting ethically is supposed to hold confidential, there is much material in the hands of an attorney which remains exposed to the subpoena power, even if that power is limited by the privilege.

1988 Report with Recommendation, Report at 16-17 (footnote omitted).

Accordingly, the 1988 Policy urged that a prosecutor be required to establish, *inter alia,* that he or she had "unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information."[6]

A *per se* requirement that courts must enforce grand jury subpoenas against attorneys for client information has the potential to undermine the

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[6] Rule 3.8 of the ABA Model Rules of Professional Conduct states that a prosecutor shall not "subpoena a lawyer in a grand jury ... proceeding to present evidence about a past or present client unless the prosecutor reasonably believes" that the information is not protected by privilege, "is essential to the successful completion of an ongoing investigation or prosecution," and "there is no other feasible alternative to obtain the information." Further, the Department of Justice guidelines, as set forth in Section 9-3.410 of the United States Attorney's Manual (2009 ed.), apparently take a similar position, stating that prosecutors are required to "strike a balance between an individual's right to the effective assistance of counsel in the public's interest and the fair administration of justice and effective law enforcement," and should make "all reasonable attempts ... to obtain the information from alternative sources before issuing a subpoena to the attorney," although ultimately giving discretion for actions to the Assistant Attorney General of the Criminal Division. *Id.*

attorney-client relationship. This is because a client under grand jury investigation will know that, without inquiry, including whether the government has other available means for obtaining the information, the lawyer may be compelled to produce to the government information that was disclosed to the lawyer through the attorney-client relationship.

The ABA believes, further, that the current three-way circuit split potentially is even more damaging to the attorney-client relationship than the Ninth Circuit's *per se* rule, because the result is that the enforcement of a grand jury subpoena against an attorney may depend on the jurisdiction in which the subpoena is issued. Because the Petition presents the Court with an opportunity to establish uniform rules for the federal courts, the ABA urges that it be granted.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — RECOMMENDATION OF THE AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES, DATED FEBRUARY 1988

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship concerning a person who is or was represented by the attorney, the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney without prior judicial approval after an opportunity for an adversarial proceeding; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court finds, on reasonable notice to the attorney and the client:

1. the information sought is not protected from disclosure by any applicable privilege;

2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative;

3. the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives reasonable and timely notice;

4. the purpose of the subpoena is not to harass the attorney or his or her client; and

5. the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.

BE IT FURTHER RESOLVED, That at the hearing, the prosecutor seeking to subpoena information as defined above, must submit to the appropriate court an affidavit making a particularized showing of the facts establishing all of the requirements specified above. The affidavit shall be disclosed to the attorney and the client. However, upon a special showing of compelling need, the affidavit may be maintained as an *ex parte* affidavit until such time as the need for secrecy is no longer compelling; and

BE IT FURTHER RESOLVED, That any hearing seeking judicial approval for a grand jury subpoena shall be conducted with consideration for the need for secrecy; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Appendix

REPORT

A.

NEED FOR THE RESOLUTION

The resolution is needed because of the increasing incidence of grand jury and trial subpoenas directed toward attorneys defending criminal cases and because the A.B.A. February 1986 resolution has proved inadequate to address this serious problem.

1. *Introduction*

In February 1986, the A.B.A. House of Delegates overwhelmingly approved a resolution requiring prior judicial approval of all subpoenas sought to be issued to attorneys for information relating to clients, and incorporation of several substantive standards to govern when such approval should be granted. This resolution was prompted by the A.B.A.'s concern over the increasing incidence of subpoenas directed to attorneys for information relating to clients, and by the effect this increasing tide of subpoenas might have on the very fabric of the adversary system and the attorney-client relationship -- the trust placed by clients in their attorneys and the confidentiality implicit in that relationship itself. The hope was that by focusing attention on this problem, and by suggesting procedures and standards to govern the issuance of subpoenas to attorneys, the tide might be stemmed before it causes any irreversible damage to the atmosphere of trust that must exist if the attorney is to

effectively perform his or her function in our system of justice.

Unfortunately, despite that resolution, the problem has grown substantially worse. In the 7 months preceding the existing resolution, according to Department of Justice statistics, approximately 170 federal grand jury subpoenas were issued to attorneys for information about a client – an average of about one each working day (24 per month).[1] In the 13 months immediately after the existing resolution was approved (March 1, 1986-March 31, 1987), approximately *525* federal grand jury and trial subpoenas were issued to attorneys for information about a client -- an average of almost two per working day (40 per month).[2]

This increasing incidence of attorney subpoenas, despite the February 1986 resolution, coupled with the sense that subpoenas to attorneys were becoming an increasingly attractive investigative method, led the Grand Jury Committee to reexamine the problem and the existing resolution. As a result, it was concluded that the existing resolution was inadequate in several key areas. Since a number of jurisdictions have already, or are in

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1. Letter from William Landers, Special Counsel to the Assistant Attorney General, Criminal Division, to the A.B.A., May 19, 1986.

2. Information provided by the Justice Department on November 14, 1986 at the National Network on the Right to Counsel Conference, New York University Law School, as supplemented by the May 11, 1987 Memorandum of the Director of Policy and Management Analysis of the Department of Justice's Criminal Division.

the process of, adopting standards based upon the A.B.A. model,[3] amending the 1986 resolution to strengthen its protections is essential if the tide of attorney subpoenas is to be controlled.

As the discussion below will set forth in greater detail, the new resolution modifies and strengthens the existing resolution in a number of respects, both procedurally and substantively. Three of these changes, however, are critically important.

First, the procedure set forth in the existing resolution calls for an *ex parte* hearing at which the prosecution seeks the permission of the court, under specified standards, to issue a subpoena to an attorney for information relating to a client. Under this procedure, however, there is no check on the overzealous advocate who either intentionally or unwittingly overstates the factual basis for the request.

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3. On October 1, 1985, the Supreme Judicial Court of Massachusetts adopted a proposed rule (Supreme Judicial Court Rule 3:08) which makes it unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney-witness to provide evidence concerning a person who is represented by the attorney-witness. The United States Attorney in Massachusetts sought to overturn that rule on the grounds that it violated the supremacy clause of the United States Constitution. The District Court upheld the ethical rule and the case is currently on appeal. *United States v. Klubock*, No. 85-4809-2 (D. Mass. 2/28/86), *aff'd*, 86-1413 (1st Cir. 1987), petition for rehearing *en banc* granted. *See also* Tennessee Supreme Court Rule 8. Bar associations in New York, Illinois and elsewhere have asked their highest courts to adopt similar ethical rules.

Moreover, permitting the prosecutor to argue the merits of the justification for a subpoena without the opportunity for the attorney sought to be subpoenaed to be present, to hear the facts presented and to make argument, tends to lead the reviewing court to become a "rubber stamp" for the prosecutor on whom the court must solely rely. And, of course, the fact that the judge has already approved the issuance of the subpoena at the *ex parte* proceeding puts the attorney at the distinct practical disadvantage when a post-issuance motion to quash is litigated, even if the *ex parte* proceeding has no binding precedential effect.

In light of these problems, the current resolution contemplates, in essence, moving the post-issuance motion to quash to the pre-issuance stage by requiring an *in camera* adversarial proceeding prior to judicial approval for the subpoena being granted. While the precise nature of the "adversarial proceeding" is left to the individual jurisdiction to define, it is intended that the issues normally resolved at the motion to quash would be resolved at the pre-issuance stage. Thus, it is only the timing of the adversarial proceeding that is affected, and no additional hearing is required by the resolution. Nevertheless, requiring that the pre-issuance hearing be an adversarial proceeding will lead to a more thorough and meaningful application of the substantive standards proposed.

It is with regard to these substantive standards that the second and third critical changes are proposed. Under the current resolution, before judicial approval may be granted the court must find only that the evidence sought

by the subpoena is relevant to the investigation being conducted and that there is no other feasible alternative. However in balancing when the need to subpoena an attorney outweighs the destructive impact this practice has on attorney-client relationships (both in general and in the specific case), there should be some showing that the evidence sought is not merely peripheral or cumulative of speculative -- that it is truly important enough to justify the damage done by the subpoena itself. Moreover, the attorney should only be subpoenaed when all reasonable attempts to obtain the information from alternative sources have actually proven to be unsuccessful -- that the subpoena to an attorney is only used as a last resort. Indeed, both of these concepts are included in the Department of Justice's own guidelines on attorney subpoenas.[4]

The current resolution addresses these important factors in the balancing process by requiring a showing that the information sought by the subpoena be essential to the successful completion of the investigation or prosecution and the prosecutor have actually attempted to obtain the information for all non-attorney sources before the attorney subpoena may be approved. These critical requirements insure that attorney subpoenas will be issued only as a last resort and only where the information sought is truly required for the fair administration of justice. Absent these circumstances, the impact of attorney subpoenas on the attorney-client relationship and the adversary system itself is simply too great to warrant their use, particularly in the numbers present today.

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4. U.S. Attorney's Manual, 9-2.161 (July 18, 1985).

Appendix

2. *Discussion*

Statistics released by the Department of Justice indicate that from July 1985 through March 1987 almost 700 attorney subpoenas have been authorized by the Department. This number, of course, does not include attorney subpoenas issued by state prosecutors. The devastating impact of these attorney subpoenas is familiar to everyone who has inflicted, endured, or witnessed them: they divert attention from the merits of the case and generate complicated controversies about tangential issues; they sap the morale of the opposing advocate by focusing attention on his own conduct or by forcing him to defend his own interest; and they channel precious time, energy, and resources into diversionary skirmishes which inevitably weaken the opposition's taste and strength for the main fight. A devise common to both civil and criminal litigation is the motion to disqualify one's opponent. In addition, those involved in the defense of criminal cases now confront, with increasing frequency, grand jury and trial subpoenas aimed directly at them. The resolution before the House of Delegates addresses this problem by requiring prior judicial approval of such subpoenas, by specifying the matters which must be considered in granting such approval and by providing that the court evaluating the propriety of the subpoena do so in the context of an adversarial hearing.

One nationally respected bar association which studied the problem for two years concluded that the unnecessary and overbroad use of subpoenas served upon defense attorneys by prosecutors "threatens both the integrity of

the criminal justice system and the ability of large classes of defendants to obtain representation."[5] The bar group further observed that the impact of the ever-increasing flow of subpoenas has created a furor unmatched in recent decades. Across the United States, lawyers, judges and legal scholars have recognized the serious impact which such subpoenas are having on existing and potential attorney-client relationships. Indeed, the "excessive use of subpoena power poses . . . one of the single greatest threats to the defense bar and to defendants' ability to obtain criminal representation."[6]

The increasing incidence of subpoenas issued to criminal defense lawyers was first documented by Professor William J. Genego of the University of Southern California Law Center. Commencing in May and June of 1985 Professor Genego sent 4,024 questionnaires to all members of the National Association of Criminal Defense Lawyers, of which 3,950 were actually delivered. He received 1,648 responses, a response rate of 42%.[7] The first

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5. Report, "The Issuance of Subpoenas Upon Lawyers In Criminal Cases By State and Federal Prosecutors: A Call For Immediate Remedial Action," Committee on Criminal Advocacy of the Bar Association of the City of New York (July, 1985), p. 1.

6. *Id.* This Report urges the nationwide adoption of a prior judicial approval requirement for attorney subpoenas that is even more rigorous than this resolution.

7. W. Genego, "Reports From the Field: Prosecutorial Practices Comprising Effective Criminal Defense," *Champion*, May, 1986, pp. 7-18; W. Genego, "Risky Business: The Hazard of Being A Criminal Defense Lawyer," *Criminal Justice*, Spring,

conclusion to be drawn from the study is that subpoenas are being issued to attorneys with alarmingly increasing frequency. Of the attorneys responding, 18% said they had received grand jury subpoenas at some point, and 68% of those had received them between 1983 and 1985. Only 15% had received them before 1980, while 18% received them between 1980 and 1982. The study also revealed that the subpoenas rain most heavily upon the more experienced advocates. Of those who had practiced more than ten years, 26% said they had received grand jury subpoenas. Of those who had practiced six to ten years, 12% had received them. Of those who were in practice three to five years, 9% had received them, while only 3% of those in practice less than three years had received them.

The increasing frequency with which defense attorneys are receiving grand jury or trial subpoenas calling for information about clients coincides, unsurprisingly, with the enactment and implementation of two federal statutory schemes, as to which the House of Delegates has already taken a position. The first set of statutes consists of the Comprehensive Crime Control Act's amendments to the federal RICO and Continuing Criminal Enterprise ("CCE") statutes, effective October 12, 1984, providing that the government's title to forfeitable property vests "upon the commission of the act giving rise to forfeiture" under the RICO[8] OR CCC[9] statute. The second set of

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1986, pp. 2-42.

8. 18 U.S.C. 1963(c) (1985).

9. 21 U.S.C. 853(c) (1985).

statutes consists of the amendments to section 6050I of the Internal Revenue Code, effective January 1, 1985, requiring all persons "engaged in a trade or business" to file a report with the Internal Revenue Service.

The forfeiture provisions of the Comprehensive Crime Control Act of 1984 spawned a spate of litigation as the federal government issued trial and grand jury subpoenas to attorneys actively involved in the defense of the very cases which forfeiture was sought. In a number of cases,[10] the government, after indictment, issued a trial or grand jury subpoena to the defense attorney, calling for information concerning the size and source of the attorney's fees. This information was to be used at trial as evidence of "substantial income," an element of the CCE charge, and as evidence relevant to the special verdict of forfeiture sought by the government. Issuance of the subpoenas was a critical part of the government's attempt to obtain forfeiture of fees paid the attorney for defense of the case. Grave concern over the practice of seeking a judgment forfeiting attorney fees led the House of Delegates on July 9, 1985 to enact a resolution opposing the practice:

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10. *E.g.*, *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985) (CBM); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Reckenmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985) (PNE); *In re Grand Jury Subpoena Duces Tecum Dated January 12, 1985* (*Paden v. United States*), No. M-11-188 (DNE) (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

> BE IT RESOLVED, That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect illegal activity of a client.

Concern parallel to that generated by the practice of seeking forfeiture of attorney fees was generated by the amendments to section 6050I of the Internal Revenue Code, which took effect on January 1, 1985. Those amendments require that lawyers, as persons "engaged in a trade or business," file a report with the Internal Revenue Service listing, among other things, the amount of currency received and the name and Social Security number of the person making payment, in those situations when the transaction (or related transactions) involves more than $10,000 in cash. Fearing that the cash reporting requirement could intrude on the relationship between an attorney and client, the House of Delegates in February 1985 passed the following resolution:

> BE IT RESOLVED, That the American Bar Association expresses deepest concern over the effect upon the attorney-client privilege and upon the confidentiality of the attorney-client relationship of Section 6050I of the Internal Revenue Code, added by Section 146 of Title

I of the Deficit Reduction Act of 1984, which requires disclosure of cash receipts in excess of $10,000;

BE IT FURTHER RESOLVED, That the American Bar Association urges the Department of Treasury to delay issuance of regulations implementing Section 6050I with respect to receipt by lawyers of cash fees or expenses for legal services until an appropriate solution to this problem can be devised.

One year later, and in the wake of many more subpoenas having been issued to attorneys, in February 1986, the House of Delegates passed the following resolution:

BE IT RESOLVED, That a prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court, in an *ex parte* hearing, finds:

1. the information sought is not protected from disclosure by the attorney-client privilege

or the work product doctrine;

2. the evidence sought is relevant to an investigation within the jurisdiction of the grand jury;

3. the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and

4. there is no other feasible alternative to obtain the information sought.

BE IT FURTHER RESOLVED, That the *ex parte* hearing seeking judicial approval shall be conducted with consideration for the need for the secrecy of grand jury proceedings. The hearing shall be conducted by a judge of a court of general criminal jurisdiction, and, wherever feasible, by the judge supervising the grand jury in question; and

BE IT FURTHER RESOLVED, That no affirmative finding in the *ex parte* proceeding shall have any evidentiary value in any subsequent adversary proceeding to determine the validity or enforcement of the subpoena; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Appendix

It had been widely hoped that the A.B.A.'s February 1986 resolution, coupled with the powerful policy arguments and the national outcry against the proliferating practice, would stem the tide of unwarranted subpoenas to lawyers. Regrettable, quite the contrary has proven true. Statistics obtained by the A.B.A. establish that at the same time the government had adopted its own subpoena guidelines and while the A.B.A.'s February 1986 resolution has been in effect, the number of subpoenas has increased dramatically.

Moreover, attorneys across the country have found that some prosecutors have not obtained Department of Justice approval for their attorney subpoenas, and thus these statistics seem to understate the problem. Similarly, because federal prosecutors obtain approval for their subpoenas from their own colleagues in a non-adversarial setting without the necessity of submitting sworn allegations of facts, the factual showings made to the Department itself may in some cases be inaccurate or overstated.

The premise of the February, 1986 resolution was identical to that of the House's resolution on forfeiture of attorney fees and its resolution on the impact of the cash reporting requirements. The unregulated and unfettered discretion to subpoena an attorney, like a judgment of forfeiture or a requirement that the attorney report certain information about a client to the IRS, intrudes abruptly on the entire relationship which an attorney must have with his client if the adversary system is to function as it should.

Appendix

Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and his attorney. One, but only one, aspect of that relation is the privilege not to disclose confidential communications between the client and the attorney, the oldest privilege for confidential communications known to the common law.[11] The United States Supreme Court has observed that "the purpose of the privilege is to encourage clients to make full disclosure to their attorneys."[12] The full and frank communication encouraged by the privilege promotes "broader interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client."[13] Any rule regulating subpoenas to lawyers must, at a minimum, provide for full protection of the privilege.

A subpoena rule which does no more than recognize the attorney-client privilege, however, will ignore other important aspects of the relationship between a client and his attorney. In those jurisdictions which have adopted the Model Code of Professional Responsibility, a lawyer is ethically required under DR 4-101 to keep a client's "confidences and secrets," the latter term being defined

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11. *Klitzman v. Krut*, 744 F.2d 955, 960 (3d Cir. 1984); C. McCormick, Law of Evidence 87, at 175 (2d ed. 1972).

12. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

13. *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981).

as "information gained in the professional relationship which the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[14] Rule 1.6 of the Model Rules of Professional Conduct likewise defines a lawyer's obligation of confidentiality to encompass matters beyond the attorney-client privilege.

Because information protected by the attorney-client privilege is not coterminous with information which an attorney acting ethically is supposed to hold confidential, there is much material in the hands of an attorney which remains exposed to the subpoena power, even if that power is limited by the privilege. For example, the prevailing judicial position is that, absent special circumstances, and attorney may be compelled by subpoena to reveal information about the identity of the client and the size and source of his fee.[15] As one court has explained:

> This result follows from defining the privilege to encompass only those confidential communications necessary to obtain informed legal advice. This definition, which focuses upon facilitating the role of the lawyer as a professional advisor and advocate, is to be

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14. Model Code of Professional Responsibility DR 4-101 (A) (1979).

15. *E.g.*, *United States v. Doe*, 722 F.2d 303 (6th Cir. 1983); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1065, 1069, dismissed as moot, 697 F.2d 112 (4th Cir. 1982) (defendant became a fugitive).

> distinguished from the so-called "incrimination rationale," which focuses on whether the material sought may be used as evidence against the client.[16]

Similarly, an attorney in possession of documents received from a client in the course of a case may be compelled by subpoena to produce those documents, assuming that the client himself could be compelled to produce the documents were they in the client's hands.[17]

Because a subpoena may compel production of information which, though unprivileged, is certainly confidential in the sense that a client has requested that it be so held or that its disclosure would be embarrassing or detrimental to a client (see DR 4-101), the mere issuance of the subpoena undermines the client's confidence and trust. Nearly a decade ago, Judge Becker of the Eastern District of Pennsylvania observed:

> [W]e are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client. . . . The dangers and disadvantages of the practice have been demonstrated in [various] cases. . . . The practice permits the government by unilateral action to create the possibility of a conflict of interest between

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16. *In re Grand Jury Subpoena Served Upon Shargel*, 742 F.2d 61, 62-63 (2d Cir. 1984).

17. 8 J. Wigmore, Evidence, 2307 (McNaughton Rev. 1961); *Fisher v. United States*, 425 U.S. 391 (1976).

> the attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship.[18]

Other courts have recognized the problem in similar terms:

> [W]hen a subpoena is issued against an attorney in an ongoing attorney-client relationship, the attorney may well be placed in the position of becoming a witness against his client or risking contempt. [T]here is the strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed. . . .
>
> If the attorney complies with the subpoena and appears before the grand jury behind closed doors, a substantial chilling effect on truthful communications from the client to the attorney thereafter would be likely, especially if the client is indicted.[19]

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18. *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945-946 (E.D. Pa. 1976).

19. *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1009 n. 4 (4th Cir. 1982).

Finally, the ABA, in its Grand Jury Policy and Model Act noted:

> Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships.[20]

As the foregoing cases and authorities recognize, the trust and confidence which is the foundation of the attorney-client relationship do not rest solely on the expectation that communications between client and attorney will remain undisclosed. Clients seeking counsel in civil lawsuits and criminal proceedings do not draw fine distinctions or follow the nuances of the privilege and its exceptions. Confronted by a hostile, powerful adversary and by an intricate and bewildering array of procedures, with their liberty and property at stake, they rightfully expect a lawyer who, within the constraints of the law and the profession's code of ethics, will zealously argue their case at every turn. There could be few things more destructive of this expectation that the spectacle of their own attorney forced by their adversary to supply information detrimental to their interest.

The unregulated power to subpoena attorneys also carries with it the potential for mischief inherent in any situation where one adversary can pummel his opponent

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20. Grand Jury Policy and Model Act, Prin. No. 23 commentary at 11 (1977).

without violating the rules. The United States District Court for the District of New Hampshire recently articulated the traumatic impact of such subpoenas on defense attorneys as follows:

> The actions of United States Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law. . . . The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguard.
>
> Also to be considered is the ever increasing specter of malpractice suits, the possible vindictiveness of prosecution counsel towards a successful, recalcitrant, obnoxious or obfuscating adversary, the jeopardizing of the attorney-client, real or imaginary, the reluctance of capable attorneys to continue or to consider a full or partial career in the practice of criminal law and the further depletion in the paucity of capable trial lawyers because of a concatenation of events leading to abuse of process.[21]

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21. *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D. N.H. 1984), *aff'd sub nom. United States v. Hodes*, 751 F.2d 13 (1st Cir. 1985).

Appendix

That Judge Loughlin's fears are real is demonstrated by one of the most startling findings of Professor Genego's study, cited earlier herein: of those members of the National Association of Criminal Defense Lawyers responding to his study, 14% said they would no longer take a case due to their apprehension of receiving a subpoena compelling information from them.

B.

EXPLANATION OF THE RESOLUTION

The resolution before the House seeks an accommodation between: (1) the public's interest in maintaining a grand jury with broad investigative power and the right to every man's evidence; and (2) the public's interest in full protection of the attorney-client relationship from the threat posed by subpoenas directed to attorneys. The threat to the attorney-client relationship is addressed in several ways. First, the subpoena cannot be issued without prior approval of a judge. This requirement insures that the decision to permit the subpoena will be made by one whose purpose in the system is to be neutral, rather than by the subpoenaed attorney's adversary. Further, judicial approval of the subpoena is preferable to prosecutorial guidelines for its issuance because of the line of authorities holding that an agency's violation of its own guidelines affords the aggrieved person no remedy of any sort.[22]

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22. *United States v. Cacares*, 440 U.S. 741 (1979).

Appendix

1. *Scope of the Resolution*

As noted above, the new resolution before the House modifies the initial A.B.A. February 1986 resolution in a number of important respects. First, the 1986 resolution was limited to subpoenas concerning current clients, while the new resolution governs the issuance of attorney subpoenas to prior clients as well. Because the issuance of an attorney subpoena may itself result in that attorney being disqualified or chill the attorney-client relationship to the point where the client terminates the relationship, the scope of the A.B.A. February 1986 resolution has been broadened to cover both ongoing and prior attorney-client relationships. This view is also consistent with ethical guidelines which require that an attorney maintain the secrets and confidences of a present or past client.[23]

2. *Procedural Provisions*

Second, the resolution differs from the February 1986 A.B.A. resolution by providing notice and hearing procedures to insure more than mere lip service compliance often associated with *ex parte* procedures. The resolution provides that the subpoena may not be issued without prior judicial approval after an opportunity for an *in camera* adversarial proceeding. The need for the procedural safeguards to be implemented by means of an adversarial hearing are obvious. By permitting

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23. *See A.B.A. Model Code of Professional Responsibility*, Ethical Considerations 4-1, 4-6; *A.B.A. Model Rules of Professional Conduct*, Rule 1-6 (Comment 22), 1.9.

the prosecutor to argue the merits of the justification for a subpoena without the opportunity for counsel for the subpoenaed attorney to be present, hear facts and make argument, the reviewing court may simply become a "rubber stamp." Moreover, the absence of opposing counsel permits the presentation of facts which may be overstated or unsupported. Hence, a procedure which permits counsel for the subpoenaed attorney to participate at an adversarial hearing maximizes the likelihood that the reviewing court's decision as to the propriety of the subpoena will be based upon a reasonable foundation of fact.

In addition, the new resolution requires that at the hearing to establish the propriety for the subpoena, the issuing attorney must submit an affidavit to the appropriate court, making a particularized showing of the facts establishing all of the requirements set forth in the resolution. This procedure which is analogous to the "Schofield Affidavit" which has been required in the Third Circuit for some grand jury subpoenas for a number of years,[24] will insure that the burden of going forward with specific facts to justify the subpoena sought will rest squarely on the party seeking the subpoena, and will crystalize the factual issues to be determined by the court. It will also tend to minimize the risk that the party seeking a subpoena might overstate the factual basis for the request.

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24. *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F. 2d 85, 93 (3d Cir. 1973).

However, because the prosecution or issuing attorney may be able to establish that there is a special secrecy problem, the issuing attorney may request, based upon a showing of compelling need, that his affidavit be maintained as an *ex parte* affidavit until such time as the need for secrecy is no longer compelling. This provision of the new resolution seeks to accommodate both the need of the prosecution, in limited circumstances, for the guarantee of no disclosure as well as the needs of the subpoenaed attorney to avoid such claims being made routinely and without a basis in fact.[25]

3. *Substantive Standards*

As to the five categories of fact that the prosecutor seeking to issue the attorney subpoena must establish, the new resolution makes some significant improvements to the February 1986 resolution, based in large part on the Guidelines adopted by the Department of Justice which govern the issuance of attorney subpoenas.[26] The first provision, requiring that the information sought not be privileged, tracks substantive law, as well as the Department of Justice Guidelines.[27] While in theory

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25. *Cf. In re Search Warrant for Second Floor Apartment*, 489 F. Supp. 207, C.O.R.I. (1980) (Government's talismatic invocation of need for secrecy in the context of the grand jury should not be routinely accepted -- to do so would reduce the court to a "rubber stamp.").

26. *D.O.J. Subpoenas Guidelines, United States Attorney's Manual*, 9-2.160, *et seq.* (July 1985).

27. *D.O.J. Subpoenas Guidelines*, 9-2.161 (F) (6).

somewhat broader than the language of the February 1986 resolution, which only required that the information sought not be protected "by the attorney-client privilege on the work product doctrine," it is difficult to imagine a situation in which some other recognized privilege would apply to an attorney subpoena. If such a situation arises, however, there is no reason not to recognize the protection of the privilege in determining whether the subpoena should be issued.

The second provision, requiring the information sought be essential to the successful completion of an ongoing investigation or prosecution and not be merely peripheral, cumulative or speculative, strengthens the language in the February 1986 A.B.A. resolution which provided only that the evidence be "relevant." Virtually any evidence can be found to be relevant in some way to a broad grand jury investigation. Moreover, if the evidence had no relevancy to the prosecutor he or she presumably would not be seeking to obtain it from the attorney in the first place. The relevancy standard is therefore simply too low a threshold of need in light of the devastating impact attorney subpoenas have. Indeed, even the Department of Justice has recognized that information should be subpoenaed from attorneys only when "there [is] reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information."[28]

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28. *D.O.J. Subpoenas Guidelines*, 9-2.16 (F) (1).

Thus, the only difference between the new resolution and guidelines adopted by the Department of Justice is the resolution's requirement that the information be "essential" to the successful completion of the investigation rather than "reasonably needed." As a practical matter this may be a distinction without a difference, since evidence that is in fact reasonably needed to successfully complete an investigation is also probably essential to that end. To the extent they are different, however, the significant threat to attorney-client relationships posed by subpoenas fully justifies that they not be issued unless the information sought is essential. If it is not, the cost of such a subpoena to the attorney-client relationship far outweighs the need for a subpoena.

The third provision, requiring that the subpoena list the information sought with particularity and be a reasonably limited period of time and give reasonable notice, tracks substantive law on drafting of subpoenas and language in the Department of Justice Guidelines.[29]

The fourth provision, requiring that the subpoenas not be used to "harass" the attorney, is similar to the A.B.A. February 1986 resolution.[30]

The fifth provision, requiring that the attorney seeking to issue the subpoena has unsuccessfully

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29. *See D.O.J. Subpoenas Guidelines*, 9-2.161 (F) (5).

30. *Cf. In re Grand Jury Matters*, 593 F. Supp. 103 (D. N.H. 1984), *aff'd sub nom. United States v. Hodes*, 751 F.2d 13 (1st Cir. 1985).

made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information, tracks the Department of Justice Guidelines, with some exception.[31] The Department of Justice Guidelines require that subpoenas be served only where all reasonable attempts have been made to obtain the information from alternate sources unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from any attorney if such attempt proves unsuccessful.[32] The new resolution requires that the lawyer seeking to issue the subpoenas attempt to obtain the information from *all* non-attorney sources and certify that there is no other feasible alternative to obtain the information. While the issue is not susceptible to hard empirical analysis, any lesser standard simply has proven inadequate. Under the lesser standards of both the February 1986 A.B.A. resolution and the D.O.J. Guidelines, attorney subpoenas have increased steadily and have caused serious deteriorations in attorney-client relations. In light of the enormously harmful impact that attorney subpoenas have on the attorney-client relationship, exhaustion of all alternatives is necessary. Simply put, subpoenaing an attorney for information concerning a client should only be done as a last resort, when all else has failed.

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31. *See D.O.J. Subpoenas Guidelines*, 9-2.161 (B).

32. *Id. See also United States v. Rogers*, No. 84-Cr. 337 (D.C. Colo. 5/21/86) (39 *Crim. L. Rptr.* 2201) (if he government is capable of proving by other means, it may not call the client's counsel, or the law firm's bookkeepers, as witnesses).

4. *Conclusion*

The notion of giving the attorney-client relationship every protection possible in the face of attorney subpoenas, reflects Principle Number 29 of the A.B.A.'s Grand Jury Policy and Model Act which unequivocably states: "No attorney . . . shall be questioned in the grand jury concerning matters he has learned in the legitimate . . . representation of his client's case. . . ." Stated another way, this resolution accords the attorney-client relationship special protection by according attorneys as a class exemption from subpoenas except in the absence of extraordinary circumstances, much in the same way that members of the press are accorded special protections from governmental subpoenas. Surely, if federal guidelines such as 28 C.F.R. § 50.10 accord special protections to reporters requiring the government to seek alternate sources of information before a subpoena is served, no less protections should be accorded to attorneys, who play as important a role in the constitutional fabric of our society.[33]

Respectfully submitted,

John M. Greacen
Chairperson
Criminal Justice Section

February 1988

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33. It is important to note, however, that it is not intended that the protections afforded by the resolution apply where the prosecutor makes a reasonable showing to the court that the attorney to be subpoenaed was involved in the criminal activity concerning which the information sought relates. It is the legitimate attorney and the legitimate attorney-client relationship, that is sought to be protected.

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IN THE

Supreme Court of the United States

WHITE & CASE LLP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber files briefs as *amicus curiae* in cases that raise issues of vital concern to the Nation's business community.

DRI—the Voice of the Defense Bar ("DRI") is an international organization comprised of more than 23,000 civil defense attorneys. DRI strives to improve the civil justice system by addressing issues of importance to the civil defense bar. For more than a half-century, DRI has worked to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. DRI promotes these objectives by participating as *amicus curiae* in cases that have direct and significant impacts on DRI's members and their clients.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief.

Two factors prompt *amici*'s participation in this case. First, the *per se* rule adopted in the Ninth Circuit's decision places defendants in the "untenable position" of choosing between the risk of adverse consequences in civil litigation and the risk of self-incrimination in a parallel criminal investigation. App. 5a. Plaintiffs can exploit this dilemma as leverage to extract speedy and sizable settlements unwarranted by the merits of their cases. Second, the express three-way circuit split, which spans six circuits, creates inconsistent laws nationwide and inevitably leads to predatory forum shopping. The implications of the Ninth Circuit's ruling—and the circuit split it exacerbates—stretch far beyond antitrust litigation.

INTRODUCTION

This dispute arises out of concurrent civil litigation and grand jury proceedings against domestic and foreign manufacturers of thin-film transistor, liquid crystal display panels (TFT-LCDs) for alleged price-fixing. Rather than stay the civil action pending resolution of the criminal investigation, the district court below ordered the civil defendants (some of whom have not been indicted in the ongoing criminal investigation) to produce discovery to the civil plaintiffs. Based in part on the government's argument that proceeding with civil discovery could place defendants in the "untenable position" of having to choose between fully defending the civil action and maintaining their Fifth Amendment right against self-incrimination, the district court entered an order specifically prohibiting the government from obtaining the civil discovery for use as evidence in the grand jury investigation. App. 5a-6a. It was in reliance upon this discovery order and the accompanying civil

protective order that defendants produced significant information from outside the United States.

Two years later, the government reversed course and issued the grand jury subpoenas at issue here. Those subpoenas sought all discovery from the related civil action, including deposition testimony and foreign-origin documents brought into the United States by the civil defendants. Pet. 12. After the district court quashed the subpoenas, the Ninth Circuit reversed. The Ninth Circuit based its decision on a *per se* rule in which a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations. This result automatically "expand[s] the DOJ's subpoena power beyond its current geographical limits," and provides the government with criminal discovery it would not have obtained but for the defendants' good-faith reliance on the discovery and protective orders in the concurrent civil litigation. App. 6a.

Like the Ninth Circuit, the Fourth and Eleventh Circuits have utilized a *per se* rule favoring grand jury subpoenas over protective orders in all circumstances. In contrast, the Second Circuit adopted the opposite approach, extending the safeguards of a civil protective order to grand jury subpoenas absent extraordinary circumstances. The First and Third Circuits have chosen a middle ground: a rebuttable presumption that grand jury subpoenas will be enforced over civil protective orders. Thus, six federal circuits have developed three completely different outcomes for defendants that face simultaneous civil and criminal proceedings and that must choose between defending their rights in one forum to their detriment in the other. This circuit split is plainly ripe for the Court's review.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO CORRECT THE DECISION BELOW AND RESOLVE A THREE-WAY CIRCUIT SPLIT.

This Court has endorsed the use of "protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases." *Degen v. United States*, 517 U.S. 820, 826 (1996). The Ninth Circuit, however, has failed to heed this Court's guidance. Applying a *per se* rule in which a grand jury subpoena always trumps a civil protective order, the Ninth Circuit dramatically expanded the DOJ's subpoena power, App. 6a, and jeopardized the district court's ability to conduct full and fair civil proceedings. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.").

The Ninth Circuit's decision leads to two immediate and harmful consequences. First, it incentivizes plaintiffs to seek overly broad and foreign-based discovery from civil defendants in order to leverage the specter of possible criminal prosecution and thus force quick and unwarranted settlements. Second, the decision below exacerbates a troubling three-way circuit split that will encourage predatory forum shopping.

A. Plaintiffs Can Exploit The Ninth Circuit's *Per Se* Rule To Leverage Speedy And Sizable Settlements In Non-Meritorious Cases.

As this Court has recognized, requiring a corporation to defend itself through the testimony of an employee that might "subject[] himself to a 'real and

appreciable risk' of self-incrimination" presents a "troublesome question." *United States v. Kordel*, 397 U.S. 1, 8-9 (1970). "[I]n such a case," the Court posited, "the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action." *Id.* at 9. Defendants in this case sought to stay discovery, but the district court denied that request in favor of limited discovery and the protective order that was nullified subsequently by the Ninth Circuit. App. 5a. This outcome is characteristic of the predicament faced by other litigants in concurrent civil and criminal proceedings where discovery stays are denied. *See, e.g.*, *In re Grand Jury Subpoena*, 836 F.2d 1468, 1469 (4th Cir. 1998) (district court denied stay and issued protective order to safeguard deponents' Fifth Amendment rights).

When civil discovery is allowed to proceed, as here, a protective order provides no shelter from a grand jury subpoena under the Ninth Circuit's *per se* rule. The Ninth Circuit's rule forces deponents to assert their Fifth Amendment privilege and withhold testimony in order to avoid self-incrimination in the concurrent criminal proceeding. This "untenable" choice potentially deprives the corporate defendant of valuable evidence necessary to defend the civil suit. App. 5a. Similarly, defendants in follow-on suits cannot rely on a protective order to shield documents produced during civil discovery from a grand jury subpoena, even when those documents originated beyond the territorial subpoena power of U.S. prosecutors. Accordingly, the only way for a civil defendant to prevent the government from using foreign-based documents in a concurrent criminal proceeding would be to refuse to produce those documents in civil discovery.

Noncompliance with civil discovery carries heavy penalties. A defendant's refusal to comply with relevant discovery requests can result in monetary sanctions, adverse inferences, and even default on the civil claims. Fed. R. Civ. P. 37(b)(2); *Mitchell v. United States*, 526 U.S. 314, 328 (1999) ("invocation of the [Fifth Amendment] privilege . . . [runs] the risk of suffering an adverse inference or even a default"); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (cataloging discovery sanctions); *see also, e.g.*, *Lockheed Martin Corp. v. L-3 Commc'ns Integrated Sys., L.P.*, No. 05-CV-902, 2010 WL 1891779 (N.D. Ga. Mar. 31, 2010) (vacating $37.3 million jury award due to discovery noncompliance). Because the Fifth Amendment does not protect against the adverse consequences of silence in civil litigation, *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976), defendants face a legal dilemma: either defend oneself fully in the civil action at the risk of providing the government criminal discovery to which it has no right to access, or risk severe adverse consequences in the civil litigation in order to avoid disclosing incriminating information that lies beyond the grand jury's reach.

The mere existence of this dilemma dramatically increases the *ex ante* costs of civil litigation as defendants must take appropriate and costly measures to reduce potential criminal exposure. For example, defendants may elect to review foreign-based documents abroad rather than risk bringing those documents into the United States. Defendants also might file additional, aggressive motions to limit broad discovery requests on the basis of relevancy, oppression, or undue burden. Fed. R. Civ. P. 26(b)(1), (c). These measures, which are necessary to mitigate the risk that civil discovery will be misused

in criminal proceedings, come with significant financial costs borne overwhelmingly by defendants.

Even more significantly, enterprising plaintiffs can exploit these *ex ante* costs, as well as defendants' concern about disclosing potentially incriminating evidence to which the government is not otherwise entitled, in order to leverage settlements in non-meritorious civil cases. Defendants may be willing to settle such cases rather than risk the threat of having documents and deposition testimony subpoenaed in a concurrent criminal investigation and to avoid the high legal costs required to limit the scope of civil discovery. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (weighing the "practical consequence[]" "that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). In contrast, in jurisdictions where defendants can rely on civil protective orders to shield discovery from grand jury subpoenas (like the Second Circuit), costly *ex ante* remedial measures would be unnecessary and the civil playing field would be leveled.[2]

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[2] The risk of unwarranted settlement has a long pedigree in private antitrust litigation. *See* Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong. 7 (1982), p. 67 (statement of Hon. William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice) (expressing the need to "reduce certain abuses of antitrust litigation that now occur, cases that are brought without any very substantial prospect of success and really can only be characterized as shakedown attempts, whereby people are induced to settle to save the litigation and discovery costs and so on that lie between them and the future"); Antitrust Equal Enforcement

Federal courts have no interest in promoting the "type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff . . . [only] because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742-43 (1975). Rather, "when the costs of discovery and litigation are used to force settlement even absent fault or injury . . . the Court, by failing to adopt a reasonable interpretation to counter th[is] excess[], risks compromising its own institutional responsibility to ensure a workable and just litigation system." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1628-29 (2010) (Kennedy, J., dissenting).

Finally, the government's lack of "bad faith" in proceedings below, App. 3a, is irrelevant. Collusion between prosecutors and plaintiffs is unnecessary in situations, like this one, where the interests of plaintiffs and prosecutors align; plaintiffs have the incentive to seek overly broad civil discovery precisely *because* prosecutors could use that discovery—to which they are not otherwise entitled—to secure a criminal indictment or conviction. The specter of criminal prosecution inevitably inures to plaintiffs' benefit, and plaintiffs do not need the government's

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Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong. 85 (1979), p. 66 (statement of Donald G. Kempf, Jr.) ("The fact of the matter is that today antitrust settlements are being entered into which bear no necessary relationship to whether or not the defendants engaged in any improper conduct or whether or not the plaintiffs suffered any damage.").

complicity or involvement in such tactics. As a result, disputes like this one can be expected to recur. *See* Mike Scarcella, *DOJ Defending Grand Jury Subpoenas in Trade Secrets Theft Investigation*, The Blog of LegalTimes, Mar. 22, 2011 (covering recent proceedings in the Fourth Circuit over an accusation "that prosecutors were unfairly piggybacking on [discovery in a] civil action, using subpoenas to try to grab documents outside of the grand jury's power"), *available at* http://legaltimes.typepad.com/blt/2011/03/doj-defending-grand-jury-subpoenas-in-trade-secrets-theft-investigation.html.

B. The Existing Circuit Split Incentivizes Forum Shopping.

In the Fourth, Ninth, and Eleventh Circuits (the *per se* Circuits), civil defendants risk sanctions, adverse inferences, or default in order to protect fully their constitutional right against self-incrimination. Pet. 16-18. In contrast, defendants in the Second Circuit can rely on the security afforded by a civil protective order to produce documents and robustly defend a civil lawsuit on the merits without fearing the government's exploitation of civil disclosures to secure a criminal indictment. Pet. 18-20. Without a doubt, plaintiffs who bring follow-on civil lawsuits in the Fourth, Ninth, and Eleventh Circuits have a distinct strategic advantage that is unavailable to plaintiffs in the Second Circuit.

The temptation to forum shop is irresistible under these conditions. That temptation increases in cases involving large corporations, which, because of their far-reaching enterprises, usually are subject to personal jurisdiction in multiple circuits. It would be naïve to think that plaintiffs would not exploit such a

significant advantage that they can leverage for settlement purposes when given the option of bringing a follow-on lawsuit in the Ninth Circuit versus the Second Circuit. Prosecutors, too, face the same temptation to forum shop, given their discretion in selecting an appropriate jurisdiction from which to issue a subpoena. Even the possibility that prosecutors would be employing such gamesmanship undermines public confidence in the uniform and fair application of criminal laws.

Presently, half of the nation's circuit courts have ruled on the interplay between civil protective orders and grand jury subpoenas. The result is three different, intractable positions on this issue among the three most active circuits for federal antitrust litigation. Pet. 16-23 (detailing circuit split); Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 59 (2010) (62% of antitrust class action suits are filed in the Ninth, Third, and Second Circuits). In another recent case, the government successfully sought certiorari on the ground that a single inconsistent circuit decision, "if left unreviewed, w[ould] encourage corporate entities to engage in forum shopping to capitalize on the ruling." Reply Brief for the United States at 9-10, *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011) (No. 09-1279), 2010 WL 3019690. The circuit split in this case is indisputably broader than it was in *FCC v. AT&T* and just as stark. In order to prevent forum shopping and ensure the uniform application of laws nationwide, the Court should grant certiorari and resolve these inconsistent judgments.

II. THIS CASE HAS BROAD IMPLICATIONS FOR NUMEROUS AREAS OF LAW.

As Petitioner correctly notes, civil suits often follow immediately on the heels of the government's announcement of a criminal investigation. Pet. 5; App. 8a. Nearly 60% of federal antitrust class action cases filed from 2007 to 2009 arose from a prior government enforcement action. Hawthorne, *supra*, at 58 (reviewing 121 lead cases compiled from 1,811 class action complaints). A survey of the 40 largest successful private antitrust lawsuits similarly revealed that only 15 of those cases did *not* follow government enforcement actions. Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Cases: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 897-98 (2008). In antitrust cases like this one, piggyback plaintiffs seek to reap the spoils of a government investigation by filing civil lawsuits for treble damages and attorneys' fees under the Clayton Act. 15 U.S.C. § 15.

This "follow-on phenomenon" recurs in a broad range of cases affecting many business sectors. In addition to the antitrust context, similar suits have been filed in products liability, securities, white collar, civil rights, and consumer fraud litigation. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 2 (2000); *see also* Pet. 24-25. The practice has become so ubiquitous that one commentator concluded, "[c]oattail class actions are a common feature of mass litigation" today. Erichson, *supra*, at 5. In this case alone, nearly 140 putative class action complaints were filed throughout the country following news that the DOJ was investigating

potential antitrust violations within the TFT-LCD industry. Pet. 4; App. 2a.

Consequently, the practical impact of the Ninth Circuit's *per se* rule and the existing circuit split will be felt in multiple areas of law and will affect numerous industries in the United States and abroad. These broad ramifications have prompted close attention to the outcome of this case, as well as *amici*'s participation here. Mike Scarcella, *DOJ Presses Law Firms in LCD Probe*, Nat'l L. J., May 10, 2010, at 6. The importance of resolving this circuit split and correcting the Ninth Circuit's decision below warrants the Court's attention.

CONCLUSION

For the reasons set forth above, the Chamber and DRI respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* JAPAN COMPETITION LAW FORUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[*]

The Japan Competition Law Forum ("JCLF") is a group of over 200 Japanese lawyers specializing in antitrust law. The JCLF aims to: 1) improve the competition law-related knowledge and skills of its members, 2) promote an exchange of information with other legal associations, including the International Bar Association and the American Bar Association, 3) improve and strengthen policies related to competition in the marketplace, and 4) improve the administration of justice in proceedings arising out of competition law. As such, the JCLF and its members have an interest in ensuring that procedures that promote international comity between antitrust enforcement regimes are respected, that Japan's antitrust regime (including its leniency program) is not undermined by cross-border discovery practices, and that Japanese

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[*] The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part. Only JCLF and its counsel participated in the drafting of this brief. The JCLF, a non-profit association of Japanese competition attorneys, will not bear the cost of the drafting of this brief or receive any financial contribution to it from third parties. One of the counsel members of JCLF and the undersigned outside counsel prepared this brief, subject to the direction and approval of JCLF's executive committee. Toshiba Corporation, a client of Petitioner White & Case LLP and a defendant in the related civil antitrust litigation, will pay the cost of undersigned outside counsel's work in drafting this brief.

companies and individuals are not subject to uncertain and potentially abusive discovery practices.

ARGUMENT

The per se rule adopted by the Ninth Circuit and two other circuits does not permit consideration of the important international interests that are implicated by a grand jury subpoena for access to foreign evidence that was produced in the United States under a civil protective order. Of particular concern to the JCLF and other foreign nationals is that the per se rule, as evidenced by the Ninth Circuit's decision in the case at hand, leaves no room for the consideration of important issues of international comity and the existence of well-established processes for obtaining foreign discovery in criminal cases. These processes, including Mutual Legal Assistance Treaties, letters rogatory, and informal diplomatic channels, respect the interests and rights of foreign states over conduct that occurred in, or persons and documents located in, their nation and involve cooperation or permission from the foreign state's enforcement agencies, courts, or diplomatic agencies.

As described below, the use of grand jury subpoenas to obtain access to materials that are in the United States only because of civil discovery under a strict protective order circumvents those procedures and potentially interferes with other nations' enforcement of their own antitrust regimes.

Of particular importance to the JCLF, the use of grand jury subpoenas rather than established methods of international criminal discovery threatens to undermine Japan's leniency program for corporate self-disclosures by preventing the Japanese government from weighing in on the appropriateness of U.S. criminal discovery of leniency applications under that program. The circuit split on the treatment of grand jury subpoenas that would pierce civil protective orders thus creates uncertainty that undermines the very purpose and efficacy of Japan's leniency program and similar programs in other countries.

The circuit split also creates intolerable uncertainty for Japanese companies and other potential foreign litigants that are subject to civil discovery in the United States but do not know the extent to which a civil protective order will be respected and enforced in the event of a grand jury investigation. The circuit split thus creates a disincentive for foreign litigants to cooperate in U.S. civil discovery.

The Japan Competition Law Forum therefore respectfully supports the petition for a writ of *certiorari* in this case so this Court can resolve the current three-way circuit split on this important issue.

A. The Per Se Rule Relied on by the Court Below Does Not Permit the Consideration of Important International Comity Concerns.

The discovery materials in this case came into the U.S. only because they were produced by foreign parties in civil discovery pursuant to a protective order. If the grand jury's subpoena is ultimately quashed, then the Department of Justice may seek foreign discovery through established methods that, as discussed below, are intended to respect foreign states' interests. Under the per se rule favoring grand jury subpoenas over civil protective orders, however, the interests of a foreign state (in this case Japan) may be wholly ignored. The Ninth Circuit's decision below thus exacerbates the existing circuit split by enabling prosecutors to circumvent the geographic limitations on grand jury subpoena authority and the well-established processes for criminal discovery that were designed to protect international comity interests.

As explained in the petition for *certiorari*, the appellate courts are divided between three competing and irreconcilable approaches to weighing the effect of a civil protective order on a grand jury subpoena. (Pet. at 14.) The crux of the circuit split is the extent to which a district court may consider the interests implicated by a grand jury subpoena when ruling on whether the subpoena should supersede a civil protective order. Two of the three tests adopted by the courts of appeals allow a district court to consider the many potential interests

implicated by a grand jury subpoena, including international comity concerns.

The Second Circuit's approach, by creating a presumption in favor of respecting civil protective orders, provides the most authority to district courts to protect the interests of foreign states. *See In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221, 1226 (2d Cir. 1991).

The balancing test utilized by the First and Third Circuits, while creating a presumption in favor of the subpoena, provides a vehicle for courts to consider important interests such as international comity concerns. *See In re Grand Jury*, 286 F.3d 153, 162 (3d Cir. 2002); *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998); . The JCLF believes that the international comity concerns implicated by this case merit quashing the subpoenas under either of these two approaches, particularly in light of the existence of well-established methods of international criminal discovery that the government chose not to pursue. But at the very least, these two approaches would allow the district court to consider the comity concerns.

In contrast, the per se rule adopted by the Ninth Circuit, and also followed by the Fourth and Eleventh Circuits, inflexibly prioritizes grand jury subpoenas over civil protective orders in all circumstances. The rule leaves no room for consideration of important concerns such as

international comity and the effect that the subpoena could have on a foreign state's interests and on foreign litigants. *See In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1227 (9th Cir. 1995); *In re Grand Jury (Williams)*, 995 F.2d 1013, 1015 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477-78 (4th Cir. 1988).

In the present case, the district court recognized that the grand jury subpoenas implicated a number of concerns, including the territorial limitations of the grand jury's subpoena power and the fact that, but for the production under a protective order in civil litigation, the discovery at issue would have remained outside the U.S. (Pet. App. at 6A-7A.) The district court distinguished prior Ninth Circuit case law utilizing the per se rule on that basis and quashed the subpoena. (*Id.* at 7A-8A.) The Ninth Circuit, however, concluded that the district court's consideration of the territorial limitations on grand jury subpoena power was inconsistent with the per se rule. (*Id.* at 3A.) The Ninth Circuit ruling leaves little doubt that the per se rule removes all discretion from district courts to consider any of the reasons why it or another district court may have granted a civil protective order, including international comity interests and the protection of foreign litigants from unreasonable criminal discovery.

Comity concerns are especially acute in the context of criminal investigations, where the risk of

infringing on a foreign sovereign's legitimate and inherent interests is far greater than in civil litigation. *See* Restatement (Third) of Foreign Relations Law § 403 (1989), reporter's note 8 ("[T]he exercise of criminal [as distinguished from civil] jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.") In fact, the Department of Justice acknowledges as much in its own policies and procedures. For example, the Department of Justice's Criminal Resources Manual observes that "the use of unilateral compulsory measures can adversely affect the law enforcement relationship with [a] foreign country." United States Department of Justice, Criminal Resource Manual § 279, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. For this reason, the Manual imposes a strict approval process for subpoenas to persons or entities in the U.S. for records located abroad. *Id.* Likewise, the Department of Justice Antitrust Division's Grand Jury Manual emphasizes that "[d]ocuments in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty" and that "courts may decline to require production of documents on comity grounds." *See* United States Department of Justice, Antitrust Division, Grand Jury Manual III-11 (1991), *available at* http://www.justice.gov/atr/public/guidelines/206696.pdf.

Likewise, this Court and others have repeatedly emphasized the importance of international comity concerns in numerous other contexts. For example, international comity considerations underlie several important and long-standing doctrines of U.S. law, such as the presumption that Congress does not intend its laws to apply extraterritorially and the Court's practice of construing ambiguous statutes to avoid unreasonable interference with foreign sovereignty. *See, e.g., Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2885-86 (2010); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-19 (1993) (Scalia, J. dissenting); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 248, 248 (1991); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

The circuit-split at issue in this case raises the very type of international comity concerns that this Court and even the Department of Justice have repeatedly recognized.

B. The Per Se Rule Does Not Permit Consideration of the Availability of Established Criminal Discovery Procedures That Protect International Comity and the Interests of Foreign States.

The grand jury's power to investigate is expansive, but not without limits. *U.S. v. R. Enter., Inc.*, 498 U.S. 292, 299 (1991). For example, as

recognized by the district court in this case, there are geographical limitations on the subpoena power. (Pet. App. at 7A); *see also U.S. v. Drogul*, 1 F.3d 1546, 1553 (11th Cir. 1993) ("Because the witnesses are foreign nationals located outside the United States, they are beyond the subpoena power of the district court."); *U.S. v. Padilla*, 869 F.2d 372, 377 (8th Cir. 1989) (where witness was a Canadian citizen residing in Canada, "a subpoena issued under Fed. R. Crim. P. 17(e)(2) would have no force"). Under the per se rule, however, grand juries can, in effect, conduct foreign discovery simply by hijacking the civil discovery process.

Unlike the other two approaches in the three-way circuit split, the per se rule utilized in the case at hand does not allow district courts to consider the existence of alternative means of securing evidence, such as Mutual Legal Assistance Treaties (MLATs), letters rogatory, and diplomatic channels. *See* Restatement (Third) of Foreign Relations Law § 442 (1989) (stating that courts should consider several factors before ordering the production of foreign documents or information, including "the availability of alternative means of securing the information"). Each of these processes is designed to respect the interests of foreign states.

For example, the Mutual Legal Assistance Treaty ("MLAT") between the United States and Japan was created for exactly the type of situation featured in this case. The MLAT allows for liberal discovery between the nations and also provides for

the cooperative prosecution of matters that affect both American and Japanese interests. Treaty Between Japan And The United States Of America On Mutual Legal Assistance In Criminal Matters, U.S.-Japan, art. 1 sec. 2, Aug. 5, 2003, S. Treaty Doc. No. 108-12. The MLAT ensures respect for the legal cultures and enforcement activities of each signatory nation by requiring the nations to consult and work with one another in furtherance of solutions that are optimal for both nations. *See id.*

Likewise, letters rogatory provide another means of obtaining international discovery, while ensuring that the interests and concerns of foreign countries are considered. *See In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 563 n.1 (6th Cir. 1975) ("Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country . . . .") (internal quotation and citation omitted). The United States and Japan have a long history of successful use of letters rogatory. *See, e.g., In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976) (granting the request of a Japanese judge for assistance through the use of letters rogatory). The letters rogatory system protects a country's comity-related interests by allowing the nation's judiciary to weigh in on the

discovery process. A judge answering a letter rogatory can take issues such as the ones present in this case into account when determining how to best fulfill a discovery request in a way that is respectful of both nations' potential concerns.

Similarly, even in the absence of an MLAT, informal diplomatic channels are frequently used in international criminal discovery. In fact, the Department of Justice's Criminal Resource Manual envisions six primary means for using informal channels to gather foreign discovery: 1) joint investigations, 2) diplomatic requests, 3) voluntary depositions, 4) informal requests similar to those made under an MLAT, 5) informal police-to-police requests, and 6) requests through Interpol. United States Department of Justice, Criminal Resource Manual § 278, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. These methods have been used by the United States to great effect. *See, e.g.*, Bruce Zagaris, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty*, 14 Ariz. J. Int'l & Comp. L. 1, 11 (1997) (documenting the use of informal diplomatic channels to gather evidence in Mexico prior to the signing of the MLAT between the United States and Mexico).

The use of MLATs, letters rogatory, and diplomatic channels helps to ensure that if the United States is conducting a criminal investigation involving documents or witnesses located abroad, the foreign government will be informed and will have

an opportunity to communicate any concerns that it may have regarding how discovery in the U.S. investigation could affect its own enforcement activity. Application of the per se rule in this case allowed an end-run around these tried and tested mechanisms and thereby undermined the very comity interests those mechanisms were designed to protect.

C. The Circuit Split Implicates Other Nations' Important Interests in the Enforcement of Their Own Antitrust Regimes, Including Japan's Interest in the Effectiveness of Its Antitrust Leniency Program.

While antitrust law has become increasingly standardized internationally, important distinctions remain that should be considered when cross-border criminal investigations take place. *See, e.g.*, *Empagran* at 167 (citing W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996)); Charles A. James, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Address before the OECD Global Forum on Competition: International Antitrust in the 21st Century: Cooperation and Conversion (Oct. 17, 2001) (noting that despite similar antitrust laws the United States and European Commission analyzed the same GE/Honeywell transaction and reached completely different results). The use of grand jury subpoenas to obtain evidence that is located in the U.S. solely because it was produced by foreign litigants under a strict civil protective order provides

no mechanism for the consideration of such differences. This is because such an approach does not require that foreign governments be informed–much less have an opportunity to object – before the evidence is used in cross-border criminal investigations. As such, the important interests that different nations have in the enforcement of their own antitrust regimes, including their interests in any ongoing investigations of their own, may be ignored entirely in favor of parochial U.S. enforcement interests.

To give an example of particular concern to the JCLF, the per se approach could undermine Japan's antitrust leniency program for companies that voluntarily self-disclose certain antitrust violations. *See* Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, art. 7-2, para. 10-26, http://www.jftc.go.jp/e-page/legislation/ama/amended_ama09.pdf (Japan). As explained in the petition for *certiorari*, (Pet. at 34-37), plaintiffs in civil lawsuits frequently seek discovery of leniency or amnesty applications submitted to the Japan Fair Trade Commission or to other governmental authorities that have leniency or amnesty programs, such as the European Commission.[1] *See, e.g., In re Rubber*

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[1] The Japan Fair Trade Commission and the European Commission filed objections in the district court in the underlying civil actions in this case. Both stressed the importance of safeguarding the confidentiality of amnesty and leniency applications. *See* Letter from the Director

Chemicals Antitrust Litig., 486 F. Supp. 2d 1078, 1080-82 (N.D. Cal. 2007); *In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 26490, *123-29 (D.D.C. Jan. 23, 2002). The disclosure of these applications would create a disincentive for companies to participate in the leniency programs, for fear that their disclosures could be obtained in civil litigation in the U.S. and then subpoenaed by a grand jury for use in U.S. criminal proceedings. Such a result would undermine the very purpose and efficacy of the leniency programs.

The existence of the current circuit split thus creates great uncertainty, which threatens to undermine Japan's antitrust leniency program and similar programs in other nations.

D. The Circuit Split Creates Opportunities for Abuse and Forum Shopping, and a Disincentive for Japanese Companies and Other Foreign Litigants to Cooperate in U.S. Civil Litigation.

The circuit split creates opportunities for substantial abuse. In the case at hand, the Japanese defendants participated in U.S. civil discovery under

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General of the Investigative Bureau, Japan Fair Trade Commission, to Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 3, 2011), ECF No. 2392; Letter from the Director General of the Directorate for Competition, European Commission, to the Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2011), ECF No. 2450.

a protective order. To their surprise, the protective order did not prevent disclosure to the grand jury of the discovery materials and testimony provided. If the circuit split continues, it will create uncertainty for foreign civil litigants, whose confidentiality expectations can be dashed – or preserved – depending on where the federal prosecutor chooses to initiate grand jury proceedings. And it will permit the U.S. government to abuse this circuit split by choosing favorable jurisdictions in which to initiate grand jury proceedings against such foreign litigants.

The per se rule in the Ninth Circuit could have a particularly significant impact on Japanese companies, which commonly base their U.S. operations on the west coast (in the Ninth Circuit) and therefore might be more likely to face grand jury investigations in that Circuit. *See generally* 2010 Survey of Japanese Companies in Southern California 1, *available at* http://www.jetro.org/documents/losangeles/2010_survey_of_japanese_companies%20_completed.pdf. Meanwhile, companies with their U.S. headquarters in the Second Circuit (including New York City) may be more likely to face grand jury investigations there and would be subject to a completely different standard in this situation.

Allowing such a divide to continue would be in conflict with this Court's most basic principles regarding the prevention of forum shopping. Moreover, this uncertainty would create a

disincentive for companies to cooperate in civil litigation and put at risk any future good faith cooperation on the part of foreign litigants during the course of U.S. civil discovery.

Such a scenario is particularly likely in antitrust cases, as civil class action follow-on suits are common when a grand jury investigation into a matter becomes public. (Pet. App. at 8A.) In such cases, Department of Justice prosecutors would have virtually unchecked authority to forgo all traditional channels for extraterritorial discovery – as well as the Department of Justice's internal procedural requirements discussed above – and simply seize the civil discovery, as it appears to have done here. This is especially problematic considering the broad scope of civil discovery and that grand juries can be empanelled for any reason and without any evidence, and conducted with minimal judicial supervision.

CONCLUSION

For the reasons stated above and in the petition for a writ of *certiorari*, the Japan Competition Law Forum respectfully urges the Court to grant the petition in order to resolve this pressing and important circuit split.

Respectfully submitted,

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Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER, WHITE & CASE LLP

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the nation's preeminent professional bar association of criminal defense attorneys. Founded in 1958, NACDL is a non-profit organization with more than 10,000 members nationwide, joined by 90 state, local, and international affiliate organizations with another 30,000 members. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness for those accused of committing crimes.

NACDL actively participates in matters addressing the legal and practical implications of criminal procedure. NACDL frequently appears before this Court as *amicus curiae* in cases that present issues of national importance to criminal defendants and their lawyers. This Court has referenced NACDL's views on several occasions. *See, e.g.*, *Kennedy v. Louisiana*, 544 U.S. 407, 443, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) (citing NACDL brief); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 n.2, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006) (same); *Brigham City v. Stuart*,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation of submission. Counsel of record for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (same); *Blakely v. Washington*, 542 U.S. 296, 312, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (noting NACDL's participation as *amicus*).

The Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is the primary organized voice for the criminal defense bar in New Jersey. Its mission includes protecting and insuring individual rights guaranteed by the New Jersey and United States Constitutions, confronting issues arising from the honest, ethical and zealous defense of the accused, and encouraging cooperation among criminal defense lawyers engaged in the furtherance of those objectives.

Because the majority of NACDL's and ACDL-NJ's members are active criminal defense attorneys, we believe that we can assist the Court in understanding the implications of this case on criminal defense counsel and their clients as well as the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

White & Case's petition addresses a question of great significance to companies and individuals in parallel civil and criminal cases – whether a federal grand jury subpoena trumps a protective order issued by a federal judge in a civil case. The six Circuit Courts of Appeals that have addressed this issue have adopted three conflicting positions.

The Second Circuit has held that a civil protective order cannot be overridden by a grand jury subpoena absent improvidence in the grant of the order or extraordinary circumstance or compelling need. *See In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991), citing *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979).

By contrast, the Ninth Circuit has adopted a "*per se* rule," which requires that civil protective orders be ignored if a grand jury subpoena is issued, divesting the court of its discretion under Rule 17(c)(2) of the Federal Rules of Criminal Procedure to quash unreasonable or oppressive grand jury subpoenas. *See In re Grand Jury Subpoenas*, 627 F.3d 1143, 1144 (9th Cir. 2010). The Ninth Circuit's ruling was based on its prior decision in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir. 1995), which in turn was based on prior rulings by the Fourth and Eleventh Circuits. *See In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240, 108 S. Ct. 2914, 101 L. Ed. 2d 945 (1988).

The First and Third Circuits have adopted a third approach. In those circuits, a grand jury subpoena is presumed to override a protective order unless exceptional circumstances are demonstrated. *See In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998); *In re: Grand Jury*, 286 F.3d 153, 157-58 (3d Cir. 2002).

The current Circuit split has created uncertainty that is likely to cause individuals and corporations to compromise or jeopardize significant rights in reliance on civil protective orders issued by federal courts. In addition, the current state of the law permits the Department of Justice ("DOJ") to obtain information to which it would not otherwise have access by luring litigants into a false sense of security afforded by a protective order issued by a federal court.

Significantly, none of these other Courts has considered a critical issue in the present case: whether a *per se* rule in favor of a grand jury subpoena is appropriate with respect to documents that would have been beyond the reach of the grand jury's subpoena, but for reliance on the protective order and the broad latitude afforded by the mandates of civil discovery. Allowing a grand jury to reach such information broadens its reach well beyond territorial limits.

Finally, the *per se* rule raises the very real potential for grand jury abuse in those Circuits following it. Under the *per se* rule, federal courts are stripped of their authority under Rule 17(c) of the Federal Rules of Criminal Procedure to evaluate grand jury requests and prevent abuses. Instead, a federal court confronted with a grand jury subpoena for information produced under a civil protective order must automatically approve it, without the opportunity to evaluate whether it is reasonable or oppressive. This removes a critical check on prosecutorial power,

contrary to established precedent and the clear language of Rule 17.

Such wide disparity among the Circuits on these important issues should be resolved with a single rule, which only this Court can provide. NACDL and ACDL-NJ respectfully urge this Court to grant review to resolve the conflict among the Circuits as to whether grand jury subpoenas override civil protective orders entered by federal judges.

ARGUMENT

I. THE THREE-WAY CONFLICT AMONG SIX CIRCUITS CREATES UNCERTAINTY AND CONFUSION THAT JEOPARDIZE SIGNIFICANT LEGAL RIGHTS.

It is not unusual for civil cases and criminal investigations to be conducted simultaneously, particularly in significant or high profile business disputes. As a result, a demand for information in a civil matter can have serious consequences in a related criminal case. Providing the information could lead to criminal exposure if it may be used as evidence in a criminal case or even made available to prosecutors. Refusal to provide discovery, however, might lead to an adverse inference or other negative consequence in a civil case. Faced with a demand for information, litigants often must wrestle with whether to provide the requested documents or testimony, or refuse, perhaps invoking their rights under the Fifth

Amendment to the Constitution. This decision is one that is often complex and weighty and is of great importance to the criminal defense bar in that it goes to the heart of the attorney-client relationship in the criminal context.

In order to address this tension between criminal exposure and civil discovery, and thereby facilitate the resolution of civil disputes, federal district courts often enter protective orders to permit the exchange of information among parties, but limit its distribution, including to law enforcement authorities. Sometimes, as in this case, DOJ intervenes in civil litigation to weigh in on the extent to which civil discovery should take place when there is a corresponding grand jury investigation. If the court then grants an enforceable protective order, this process naturally induces individuals and businesses to provide information that will assist in the resolution of the civil case in the belief that discovery will proceed with DOJ's blessing in accordance with the terms of the protective order.

Given the current uncertainty about whether a grand jury subpoena trumps a protective order, however, any such reliance may be misplaced. In reality, a litigant has no way of knowing if, upon receipt of a grand jury subpoena, a protective order issued by a federal court will be viewed as presumptively valid and enforceable (Second Circuit), a protective order always will be trumped and nullified by a grand jury subpoena (Fourth, Ninth and Eleventh Circuits), a court will presume supremacy of the

grand jury subpoena absent a showing of extraordinary circumstances (First and Third Circuits), or a court will create some other approach.[2]

A litigant is therefore left to guess whether DOJ, through the use of a grand jury subpoena, will be able to force a federal judge to ignore an order issued by a federal court. An individual or business in this position cannot make an informed decision – and a

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[2] To date, there is no controlling law in the remaining Circuit Courts of Appeals. Recently, however, the Tenth Circuit followed the rationale of the Second Circuit rule in *Martindell* when it reversed a district judge's modification of a protective order. *S.E.C. v. Merrill Scott & Associates, Ltd.*, 600 F.3d 1262, 1273 (10th Cir. 2010). In *Merrill Scott*, the district judge had modified a protective order to allow the SEC to disclose documents produced in reliance on the protective order to other government agencies, including DOJ and the IRS. In reversing the modification, the Court employed *Martindell's* rationale:

> Unless protective orders are fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. Witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

(Internal quotation marks and citation omitted.) *Id.*, at 1272, quoting *Martindell v. Int'l Tel. & Tel. Corp.*, *supra*, 594 F.2d at 295-96. The Court went on to hold that, under the circumstances presented, in which the Government seeks to overcome a protective order, a very high standard of "*unusual*" or "*extraordinary circumstances*" must be demonstrated. *Merrill Scott*, *supra*, 600 F.3d at 1272-73.

criminal defense attorney cannot adequately advise a client – about whether to forgo rights and defenses that could be invoked to prevent production of the information at issue. Only this Court, by granting this petition for certiorari, can put an end to this confusion.

II. THE CURRENT STATE OF THE LAW PERMITS DOJ TO MANIPULATE THE DISCOVERY PROCESS, WHETHER INTENTIONALLY OR OTHERWISE, TO OBTAIN INFORMATION TO WHICH IT WOULD OTHERWISE NOT HAVE ACCESS.

Given the current three-way, six Circuit split, a litigant may be lured, intentionally or otherwise, into a false sense of security provided by a protective order issued by a federal court, only to find the order invalid if DOJ causes a grand jury subpoena to issue. This is particularly true where, as here, DOJ intervened in the civil action and participated in the civil discovery process, which ultimately led to the issuance of the protective order.

Because it has broad discretion to determine the federal district in which a grand jury subpoena is issued, DOJ can often exercise substantial control over the process. In fact, DOJ instructs prosecutors to consider "potential difficulties in conducting grand juries in particular jurisdictions" when they determine where to empanel a grand jury. United States Department of Justice, Antitrust Division, *Antitrust Division Manual* III-88 (4th ed. 2008), available

at http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf (last visited Apr. 18, 2011). In a matter of national or international scope, such as certain antitrust investigations, DOJ might have virtually unlimited discretion in terms of where to convene a grand jury and thus the Circuit in which a challenge to a grand jury subpoena would be heard. In other words, faced with a civil protective order, DOJ could convene a grand jury in the Fourth, Ninth or Eleventh Circuit to take advantage of the favorable *per se* rule in those circuits.

The facts of this case starkly illustrate the potential mischief that is possible under the current state of the law. Here, DOJ intervened in the civil case to protect its interest in a parallel grand jury investigation. DOJ actively participated in the civil litigation in which the protective order was crafted and entered. In direct response to its motion, the District Court entered a protective order permitting DOJ to review discovery but prohibiting it from obtaining copies. DOJ abided by and accepted the fruits of this order for years. After the parties had relied on the protective order by producing documents pursuant to it, DOJ sought relief from the protective order, fully litigating before the District Court its desire for copies of civil discovery. The District Court denied the DOJ's efforts to amend the protective order. Only then did DOJ cause a grand jury subpoena to be issued in an attempt to end-run the District Court's protective order.

It should not be permissible for DOJ to participate in the civil discovery process, including the issuance of a civil protective order, by a federal court, and then, after the parties and the court rely on the protective order, seek to trump its effect through the issuance of a grand jury subpoena. Were this acceptable, DOJ could manipulate parties, their counsel and the court into sanctioning the production of discovery, falsely confident in the belief that the discovery could be used only in the civil litigation. Then, it could issue a grand jury subpoena to obtain information to which it would not otherwise be entitled.

It is respectfully submitted that the Court should grant certiorari so that the law may be clarified to prevent such manipulation, intentional or otherwise.

III. THE NINTH CIRCUIT DECISION IMPERMISSIBLY EXPANDS THE POWER OF THE GRAND JURY BEYOND TERRITORIAL LIMITS.

The Ninth Circuit's decision represents a sea change from current legal norms because it places documents and testimony that previously had been beyond the jurisdiction of the grand jury within the grand jury's reach. Specifically, the Ninth Circuit's decision placed foreign documents and testimony ordinarily out of reach of the grand jury directly into its hands – once those documents were produced in

this country pursuant to a civil protective order. *See In re Grand Jury Subpoenas*, *supra*, 627 F.3d at 1144.

In a conclusory statement, the Ninth Circuit held "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." *Id.* That the documents were "within its grasp" is hardly a foregone conclusion.

In each of the other Circuit Court decisions giving rise to the present Circuit split on the interplay between a grand jury subpoena and a civil protective order, the underlying information sought always had resided within the territorial limits of the United States. Thus, there was no question that it could have been obtained directly by a grand jury subpoena, rather than through subpoena of the fruits of civil discovery. *See In re: Grand Jury*, *supra*, 286 F.3d at 160 [3d Cir. 2002] ("the grand jury may obtain evidence by means other than subpoenaing civil discovery materials. . . . it may subpoena witnesses directly, and the Government could grant these witnesses immunity if they refuse to testify"); *In re Grand Jury Subpoena (Roach)*, *supra*, 138 F.3d at 443 [1st Cir. 1998] (seeking deposition transcripts of deponent intervenor); *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, *supra*, 62 F.3d at 1226 [9th Cir. 1995] (noting "the historical investigative powers of the grand jury," when allowing subpoena of documents from civil lawsuit by medical insurance companies against United States weight-loss

clinics for fraudulent billing scheme); *In re Grand Jury Proceedings*, *supra*, 995 F.2d at 1016 [11th Cir. 1993] (noting that any *citizen* may be subpoenaed to provide testimony before a grand jury); *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, *supra*, 945 F.2d at 1223 [2d Cir. 1991] (seeking transcripts from depositions of employees of various United States airline companies and unions); *In re Grand Jury Subpoena*, *supra*, 836 F.2d at 1480 (*Sprouse, J., dissenting*) [4th Cir. 1988] ("[t]he government remains free to call the deponents before the grand jury to explore their fifth amendment claims and to prosecute or grant immunity"); *Martindell v. Int'l Tel. & Tel. Corp.*, *supra*, 594 F.2d at 296 [2d Cir. 1979] ("the Government may institute . . . a grand jury proceeding and . . . subpoena witnesses to testify, regardless of whether they have already testified or furnished documentary evidence in civil litigation"). None of these other decisions contemplated a subpoena of information originating outside of the grand jury's jurisdiction and produced in the United States only in response to a civil court order.

This distinction is critical. Rule 17(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 1783 expressly limit the service of a grand jury subpoena for witness testimony either to the United States or, if the subpoena is to be served abroad, to a "*national or resident of the United States* who is in a foreign country." (Emphasis added.) 28 U.S.C. § 1783. In other words, a federal grand jury may subpoena testimony or documents from witnesses in a foreign

country only if the court has "*in personam* jurisdiction of the person in possession or control of the material." *United States v. First Nat. City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968). *See, e.g., First Nat. City Bank of N.Y. v. I.R.S. of U.S. Treasury Dept.*, 271 F.2d 616, 618 (2d Cir. 1959) (requiring U.S. bank to produce records from bank's Panamanian branch because U.S. branch officer could request those documents from foreign branch).

In contrast, Rule 34 of the Federal Rules of Civil Procedure permits discovery of any document over which a party has "control," irrespective of the document's location. Control in this context simply means the legal right to obtain a document on demand. *Gerling Intern. Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988). *See also* Wright & Miller, Fed. Prac. & Proc. Civ. § 2210 (3d ed.). Thus, in contrast to a grand jury subpoena, a court in a civil case may compel the production of documents located in a foreign country whenever it determines that a party may obtain the documents from abroad, even if the foreign party is an unrelated entity. *See, e.g., Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649 (D. Kan. 2004) (court compelled production of documents located in Turkey held by unrelated legal entity that had entered a business relationship with U.S. entity).

The reach of civil discovery, therefore, is broader than that permitted in the criminal context. In fact, it is beyond dispute that the foreign documents and testimony sought here were beyond the reach of the grand jury's subpoena power. If the Ninth Circuit's

rule stands, however, grand jury power may be expanded whenever used in concert with civil discovery. This opens up possibilities of civil discovery abuse that did not exist before the decision below and constitutes an impermissible expansion of grand jury subpoena power beyond territorial limits.

This expansion of grand jury subpoena power over foreign documents and witnesses has far-reaching consequences. Various methods of obtaining foreign information already are in place, through negotiated mutual legal assistance treaties ("MLATs"),[3] letters rogatory and such other diplomatic means. Under this rule, however, one member of the Executive Branch – the prosecution – may circumvent these carefully negotiated arrangements by another member of the Executive Branch – the State Department – as a matter of law, simply by issuing a

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[3] The United States is a party to at least twenty MLATs. *United States v. Balsys*, 524 U.S. 666, 715, 118 S. Ct. 2218, 141 L. Ed. 2d 575 (1998). Two agreements with Japan that are relevant here are the Treaty between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters, available at http://www.mofa.go.jp/region/n-america/us/treaty0308.pdf (last visited Apr. 18, 2011) and the Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, available at http://www.justice.gov/atr/public/international/docs/3740.htm (last visited Apr. 18, 2011). *See also* Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_documents&docid=f:td001.pdf (last visited Apr. 18, 2011).

grand jury subpoena to cover such information. This prosecutorial end-run invites retaliatory conduct by other countries.

One example of such conduct is the enactment of "blocking" statutes, frequently prompted by United States antitrust litigation such as the present case.[4] A second example of a retaliatory risk that could have a significant effect on *amici* and their clients is that foreign countries may subsequently adopt similarly expansive interpretations of their ability to compel the production of evidence to their tribunals that would normally be beyond their jurisdictional reach or that could only be obtained through the invocation of the MLAT provisions to seek assistance from the United States. Entities from the United States would thus be subjected to demands for disclosure of information in foreign tribunals whether or not such information would otherwise be available. Not only would such a consequence vitiate the MLATs and other diplomatic agreements negotiated by the Executive Branch, the result would have adverse consequences for many United States citizens and entities

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[4] *See* R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO WASH. J. INT'L L. & ECON. 315, 315-17 (1995) ("[a]ttempts to enforce aggressive U.S. antitrust laws against anticompetitive behavior abroad have caused some foreign governments to claim that their sovereignty has been violated. To protect this sovereignty from outside incursion, many of these governments enacted blocking statutes to prevent compliance with U.S. discovery orders within their borders.").

who are not a party to this proceeding. Clients of the *amici* might well be forced to turn over domestic material to foreign criminal investigators in sovereign nations that have taken similarly broad views of their investigatory power.

It is respectfully submitted that this Court should grant certiorari to clarify whether such an extraterritorial expansion of grand jury power is permitted in light of the many diplomatic channels available.

IV. THE *PER SE* RULE SEEMINGLY ELIMINATES A FEDERAL COURT'S AUTHORITY PURSUANT TO RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO PREVENT GRAND JURY ABUSES.

Most troubling about the *per se* rule as applied by the Ninth Circuit is the fact that it apparently allows a prosecutor to usurp the discretion given to federal judges under Rule 17(c)(2) of the Federal Rules of Criminal Procedure. This removes a critical check on prosecutorial power.

This Court has held that, although a grand jury is entrusted with substantial investigatory powers, these powers are not unlimited and are, in fact, subject to judicial supervision. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299, 111 S. Ct. 722, 727, 112 L. Ed. 2d 795 (1991). The mechanism for restraining the power of an overzealous grand jury is found in Rule 17(c)(2), which permits a federal judge

to quash a grand jury subpoena if compliance would be "unreasonable or oppressive." *Id.*, *quoting* F. R. Crim. P. R. 17(c)(2). This requires a fact-specific and context-sensitive inquiry into the circumstances surrounding the demand for information. *See id.*

Federal judges therefore are afforded a critical role in evaluating and, if appropriate, limiting the investigatory power of the grand jury. Indeed, courts are often called upon to review and quash grand jury subpoenas. *See, e.g., In re Grand Jury Proceeding*, 455 F. Supp. 2d 1281, 1286 (D.N.M. 2006) (quashing grand jury subpoena for saliva sample without warrant); *In re Grand Jury Subpoena*, 463 F. Supp. 2d 573, 576 (W.D. Va. 2006) (quashing subpoena of criminal defense attorney regarding conversations with former client and third-party as privileged under work produce doctrine); *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd*, 751 F.2d 13 (1st Cir. 1984) (quashing subpoenas of criminal defense attorneys regarding clients with pending criminal cases); *In re Stolar*, 397 F. Supp. 520, 525 (S.D.N.Y. 1975) (quashing subpoena requiring address and telephone number of criminal client from his attorney). Nowhere does Rule 17 limit the contexts or circumstances in which district courts review grand jury subpoenas.

Under the *per se* rule, however, a federal court loses its ability to evaluate a grand jury subpoena in one context. A judge faced with a grand jury subpoena for information previously produced pursuant to a civil protective order may not, under the *per se* rule,

determine whether the circumstances in which a civil protective order was issued would make it unreasonable to enforce the grand jury subpoena. Instead, the court is required to give automatic judicial benediction to the requests of the grand jury. This effectively strips the court of the authority provided by Congress under Rule 17 and long recognized as critical by this Court.

The absence of a chance for judicial review leaves the very real potential for grand jury abuse. Indeed, both the Second and Tenth Circuits have articulated concerns about grand jury impropriety under the *per se* rule. *S.E.C. v. Merrill Scott & Associates, Ltd.*, *supra*, 600 F.3d at 1272-73 ("Given the government's vast investigatorial resources and power for oppression . . . courts have required a showing of unusual circumstances . . . or even extraordinary circumstances . . . before permitting the government to benefit from access to confidential information provided pursuant to a protective order. . . ." [Internal quotation marks and citations omitted.]); *Martindell*, *supra*, 594 F.2d at 296 ("the Government as investigator has awesome powers which render unnecessary its exploitation of the fruits of private litigation." [Internal quotation marks omitted]).

It is respectfully submitted that this Court should grant certiorari to clarify whether the court may be stripped of its important judicial balancing function under the *per se* rule.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WHITE & CASE, LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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April 20, 2011

QUESTION PRESENTED

In this case, the Ninth Circuit applied its "*per se* rule" that a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations such as the territorial limitations on a grand jury's subpoena power. This holding implicates, as the district court recognized, the rights of foreign sovereigns and the important principle of international comity. The Department of Justice's (DOJ) own policies regarding obtaining foreign evidence reflect international practice but were not followed in this case, nor were the procedures set forth in at least two international agreements to which the United States is a party.

The question *amicus* will address is:

Whether a grand jury subpoena always trumps a civil protective order, thus allowing prosecutors to obtain discovery materials from a parallel civil action, regardless of any countervailing considerations of foreign sovereignty and international comity.

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INTEREST OF AMICUS[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States' economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk. *Amicus* gave notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case. We highlight the salient facts relevant to our argument here.

In 2006, the United States Department of Justice ("DOJ") was conducting an antitrust investigation into alleged criminal conduct. Soon after this investigation became public, a number of civil suits were filed by private plaintiffs against the companies under investigation. These suits were consolidated in the Northern District of California before District Judge Illston. The litigation resulted in the production by the civil defendants of documents originating outside the United States. The documents at issue came into the possession of the petitioner law firm and other law firms in the United States. Petitioner's App. "(App.") 2a.

After the grand jury investigation became public knowledge, more than 100 putative class actions, seeking treble damages, injunctive relief and attorneys' fees, were filed all over the country.[2]

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[2] DOJ does not dispute the fact that its grand jury investigation instigated the class actions. *See* United States' Notice of Mot. and Mot. to Modify the (continued...)

The Class Actions were transferred to the United States District Court for the Northern District of California, the same district in which the grand jury sits, for coordinated pretrial proceedings. *See* Plaintiffs' Mot. for Transfer and Consolidation of Related Antitrust Actions to the Northern District of California Pursuant to 28 U.S.C. § 1407, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 1827 (J.P.M.L. Dec. 22, 2006) (ECF No. 1).

The civil class action complaints named a number of foreign corporations, including certain Toshiba entities (collectively "Toshiba"), represented by Petitioner White & Case, LLP, as Defendants.[3]

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[2](...continued)
Court's Sept. 25, 2007 Order Granting United States' Mot. to Stay Discovery at 6-7, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. May 18, 2009) (ECF No. 990).

[3] Jurisdiction over the foreign defendants was obtained by service of process under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (the "Hague Service Convention").

DOJ intervened and sought to stay discovery in the civil actions.[4] The district court stayed most discovery and permitted DOJ to review, but not copy, the limited class-certification discovery that was allowed to proceed. The stay order prohibited DOJ from using the civil discovery materials as evidence in the grand jury investigation.

More than two years after the grand jury investigation became public, DOJ asked the parties in the class actions for copies of all civil discovery, including documents and deposition testimony originating outside the United States. Toshiba and other defendants objected. The Special Master in the class actions issued a Report and Recommendation, App. 11a, *et seq.*, prohibiting DOJ from copying the foreign documents and deposition transcripts of

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[4] DOJ argued that because civil discovery is broader than criminal discovery there was the risk that parties in the civil action would be able to discover sensitive grand jury information, thus interfering with the criminal investigation; DOJ also argued, correctly, that if civil discovery proceeded, employees of the companies being investigated could be placed in the position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inferences that come with that invocation, or testifying in a civil deposition and running the risk of self-incrimination. App. 5a.

defendants in the Class Actions who had not been indicted[5] and from presenting any such materials to the grand jury. App. 14a-15a. The district court adopted the Special Master's Report and Recommendation. App. 9a-10a. The Special Master acknowledged that "[i]t is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings." App. 13a.

Having failed to obtain the foreign-based discovery through modification of the stay order, DOJ had the grand jury issue subpoenas duces tecum to law firms representing defendants in the civil MDL Action, including White & Case. White & Case and the other law firms moved to quash the subpoenas.

Judge Illston, after extensive briefing and a hearing, quashed the grand jury subpoenas, finding that "the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits." App. 6a. Judge Illston also noted that the foreign-origin documents and deposition transcripts were present in the United States solely because of compelled civil discovery in the Class Actions that had followed on the heels of the disclosure of DOJ's

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[5] Toshiba has not been indicted.

grand jury investigation, and that DOJ normally would be required to utilize one of the customary methods, such as letters rogatory. App. 7a.

The Ninth Circuit reversed, summarily applying the *per se* rule from its decision in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995), without considering any countervailing factors: "we apply our *per se* rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a. The Court of Appeals said nothing about the international implications of the use of a grand jury subpoena to obtain evidence that would, save for the compulsion of discovery in the civil case, be located in abroad.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner has shown that there is a clear conflict between the Ninth Circuit's "*per se* rule" and the Second Circuit's presumption that a civil protective order trumps a grand jury subpoena, absent certain exceptional circumstances and the rules in other circuits that presume that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances.

This case also presents an important additional issue relating to the United States' adherence to principles of international comity and treaty obligations. That issue was referred to by the district court and extensively briefed to that court, but completely ignored by the Court of Appeals.

Business interests cut across national boundaries. Private enterprises export, invest, transfer technology, and engage in many other business activities across national boundaries. Transnational activities are expanding at an unprecedented rate and this trend will accelerate through the growth of globalization and economic interdependence.

The importance of international trade for the United States economy is widely recognized: "[E]xpanding trade and opening markets will lift . . . standards of living" and increase profitability. *See* Remarks by President Barack Obama to the Chamber of Commerce, February 07, 2011, available at http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce (accessed April 15, 2011); *see also*, Remarks by President Barack Obama in the State of Union Address, Jan. 25, 2011, available at http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address (accessed April 15, 2011): "The simple fact is that the more American . . . companies export, the more they produce. The more they produce, the more workers they need. And that means jobs. Good paying jobs here at home. . . exports directly support nearly 10 million U.S. jobs. . . ." (Secretary of Commerce Gary Locke, Remarks at New Markets, New Jobs: The National Export Initiative Small Business Outreach Tour, New Orleans, Louisiana, April 11, 2011, available at http://www.commerce.gov/news/secretary-speeches/2011/04/11/remarks-new-markets-new-jobs-national-export-initiative-small-bus (accessed April 15, 2011).

Transnational economic activities tend to increase economic efficiency and the wealth of trading nations and political cooperation; this was the objective of the post-World War II economic institutions such as the General Agreement on Tariffs and Trade (GATT), the International Monetary Fund, the World Bank, the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), and more recently, the World Trade Organization (WTO).

As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders, but at the same time, the nation-state system is still the political reality in international relations, and the legal or regulatory framework that governs trade is primarily national. National competition law and policy, and objectives, differ from country to country, and this fact may create international friction or conflict among trading nations. This, in turn, may create instability and uncertainty for enterprises that conduct business across national boundaries.

International cooperation among trading nations with regard to the implementation and enforcement of competition law and policy is

necessary and desirable, but a mutual respect for national law, traditions and circumstances need to be maintained. The United States has entered into numerous bilateral cooperation agreements with respect to competition. Cooperation, communication and coordination among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and the fosters competition in markets. *See* John J. Parisi, "Enforcement Cooperation Among Antitrust Authorities," paper delivered to the IBC UK Conferences, Sixth Annual London Conference on EC Competition Law, London, England, 19 May 1999 (Updated October 2000), available at http://apps.americanbar.org/intlaw/regulation/enforcementcooperation.pdf (accessed April 15, 2011)[6]

Here, however, DOJ has, apparently for the first time, exploited civil jurisdictional and discovery rules to sidestep territorial limitations on grand jury subpoena authority. If the Ninth Circuit's *per se* rule is allowed to stand, DOJ will have a

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[6] Mr. Parisi at the time was Counsel for European Union Affairs in the International Antitrust Division of the United States Federal Trade Commission, but the views were his own and did not necessarily reflect the views of the Federal Trade Commission or the United States government.

method, not requiring explicit collusion with any other party, of rendering nugatory our country's obligations to other nations with respect to obtaining documents located abroad during criminal investigations. This circumvention is particularly problematic where, as here, an announcement of a grand jury investigation – not unexpectedly – gives rise to the civil actions. ("It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery." Judge Illston's "Statement of Reasoning Involved in Court's Order of February 11, 2010," App. 8a.)

The Ninth Circuit's *per se* rule enables DOJ to circumvent well-established methods for seeking foreign-based discovery, and instead to exploit the broad discovery permitted in the U.S. civil cases that it knows will follow announcement of an investigation. The Ninth Circuit's *per se* rule ignores potential international complications and consequences that might well follow the use of criminal grand jury subpoenas to compel production of foreign company documents and testimony that are in the United States only by reason of the the civil litgation, and against the foreign company's will. This can harm American businesses that may be the subject of foreign

proceedings or which may need discovery in a foreign country. Many such companies are members of the National Association of Manufacturers.

I.

THE COURT SHOULD GRANT THE PETITION TO ENSURE THAT LOWER COURTS RECOGNIZE THAT THE GRAND JURY SUBPOENAS IMPLICATE IMPORTANT ISSUES OF SOVEREIGNTY AND INTERNATIONAL COMITY, MAY JEOPARDIZE RELATIONS WITH FRIENDLY NATIONS, AND RISK RETALIATION BY FOREIGN COUNTRIES

The grand jury subpoenas implicate important issues of sovereignty and comity because they are directed to law firms representing foreign entities and seek foreign companies' documents that would not otherwise be subject to a grand jury subpoena.[7]

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[7] DOJ argued below that because the documents and deposition transcripts are physically in the United States – in the offices of the law firms – "international" considerations are not relevant. The Special Master expressed serious doubts about this argument: "I am troubled by this idea that [a defendant] on the one hand can be ordered to bring

(continued...)

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[7](...continued)
this stuff into the United States, and then the Government can say, ah-ha you brought it in, now we gotcha." Transcript of Proceedings, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, MDL No. 1827 (N.D. Cal. Aug. 12, 2009) at 13:7-10.)

The Special Master noted that the "Defendants did not 'choose to avail themselves' of the US courts or voluntarily 'bring evidence from overseas into the United States.' Rather they were hauled, kicking and screaming, into our courts and have vociferously argued against producing either their documents or their employees into this country during this entire litigation." App. 13a. She stated that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power." App. 12a (emphasis in original).

A. International Comity

International comity principles are based on the concept of reasonableness. Comity, a long-standing tenet of international law, limits "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation" because of "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own nationals or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (refusing to enforce French judgment because France did not enforce U.S. judgments).[8] In the absence of comity, "nothing would be more convenient in the promiscuous [*sic*] intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of

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[8] In *Hilton*, this Court defined international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." 159 U.S. at 124.

law." *Emory v. Grenough*, 3 U.S. 369, 370 fn (1797) ("By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.") The existence of national power to prescribe conduct consequently does not mean that exercising such power is wise.[9]

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[9] Justice Robert Jackson characterized comity as essential to the pacific and efficient functioning of the community of nations:

> [International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own . . . [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

B. There Are Alternative Methods For Obtaining Information

There are alternative methods by which DOJ can obtain foreign documents without issuing grand jury subpoenas to the law firms. As the district court recognized, information could be obtained through the use of letters rogatory[10], requests under treaties and executive agreements, or through informal means. Judge Illston's Statement of Legal Reasoning, App. 7a.[11] DOJ pursued none of these accepted methods.

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[10] "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." ABA, Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations* 281 (3d ed. 2002).

[11] These established methods, which acknowledge the prerogatives of foreign sovereigns and foster international comity, are enumerated in DOJ's own manuals. *See* United States Department of Justice, *Criminal Resource Manual* §§ 267, 274-78. ("Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty.")

Letters rogatory, mutual legal assistance treaties ("MLAT"), and informal requests through regular diplomatic channels are resources available to DOJ to obtain foreign evidence for use in criminal investigations or proceedings. *See* United States Department of Justice, *Criminal Resource Manual* §§ 274 – 278 (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm, accessed April 15, 2011)). MLATs and letters rogatory are specifically mentioned in DOJ's manuals because they were designed to respect the rights of foreign sovereigns and to preserve international comity.

Two international agreements between the United States and Japan provide procedures for obtaining evidence in a case such as this, and indeed, the DOJ's own policies regarding obtaining foreign evidence reflect international practice, but both the international agreements and the DOJ policies were not followed. These agreements specifically address methods for obtaining evidence or other assistance from foreign countries whose companies have been involved in the civil action and have specific provisions describing the process for obtaining such information, identifying the governmental authorities authorized to make such requests and the information is to be included in the requests.

First, the Treaty Between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters, U.S.-Japan, Aug. 5, 2003, S. Treaty Doc. No. 108-12 (2003) ("Japan MLAT") (available at http://www.justice.gov/atr/public/guidelines/206696.pdf, accessed April 16, 2011) "obligates the Parties to assist one another in investigations, prosecutions and other proceedings in criminal matters through. . . producing documents and other items of evidence." Statement of Mary Ellen Warlow, Director, Office of International Affairs, Criminal Division, United States Department of Justice, Bilateral Law Enforcement Treaties: Hearing Before the S. Comm. on Foreign Relations, 109th Cong. 11 at 11 (2005)) 11. The Japan MLAT was intended to "enhance law enforcement cooperation" with respect to investigations of potential antitrust violations. *Id.* at 10. The Japan MLAT expressly recognizes the parties' rights, as sovereigns, to deny a request on certain enumerated grounds. *See* Japan MLAT, Art. 3. Article 7 permits a sovereign party to attach conditions on the use of documents transmitted under the Japan MLAT.

Second, the Agreement between the United States and Japan Concerning Cooperation on Anticompetitive Activities (the "U.S.-Japan Cooperation Agreement"), Oct. 7, 1999, T.I.A.S., available at http://www.justice.gov/atr/public/

international/docs/ 3740.htm (accessed April 15, 2011) describes procedures for cooperation in antitrust enforcement. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. (Art. I, § 1).[12]

Article VI, § 1 of the U.S.-Japan Cooperation Agreement requires that each Party shall give "careful consideration to the important interests of the other Party throughout *all phases* of its enforcement activities" (emphasis supplied) and Article VI, § 2 requires that "When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall

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[12] The United States has also entered into a number of other bilateral antitrust cooperation agreements antitrust matters that provide for notification and cooperation with respect to enforcement activities affecting other states' important interests. *See generally* United States Department of Justice, Antitrust Division, *Antitrust Cooperation Agreements*, available at http://www.justice. gov/atr/ public/international/int-arrangements.html (accessed April 17, 2011). Besides Japan, Australia, Brazil, Canada, Chile, Germany, Israel, Mexico, the Russian Federation, and the European Communities are parties to such agreements.

endeavor to provide timely notice of significant developments of such enforcement activities." Of particular relevance in this case, Article X, § 2 provides

> In the event that information communicated by a Party to the other Party pursuant to this Agreement, except publicly available information, is needed for presentation to a grand jury or to a court or a judge in criminal proceedings, *that Party shall submit a request for such information to the other Party through the diplomatic channel or other channel established in accordance with the law of the requested Party.* The requested Party will make, upon request, its best efforts to respond promptly to meet any legitimate deadlines indicated by the requesting Party.

(Emphasis supplied)

These antitrust cooperation agreements, specifically the one with Japan, often give the state parties discretion to reject requests for assistance in obtaining evidence if, among other things, the conduct that is the subject of a DOJ investigation or proceeding does not constitute a

crime under their laws.[13] This is particularly significant in some transnational antitrust cases because some states do not attach criminal liability to antitrust violations. The U.S.-Japan Cooperation Agreement contains a specific provision, Articel X(2), for information needed for grand jury proceedings; it only requires "best efforts to respond promptly to meet any legitimate deadlines," but does not mandate compliance with the request.

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[13] The established procedures for obtaining foreign evidence are grounded in jurisdictional limits based on sovereignty and comity and foreign sovereigns' hostility to the use of invasive discovery tools in their territory. When the United States seeks foreign discovery for a criminal investigation, principles of international comity dictate that the United States should follow established procedures and seek documents directly, in order to give foreign sovereigns notice and the opportunity to object to a request. DOJ's argument that "earlier in the investigation" it had notified Japan of "about our investigation" (United States' Opposition to White & Case LLP's Motion to Quash Grand Jury Subpoenas Served on White & Case LLP Dated December 8, 2009 in Case Nos. CR 10-90019 MISC; CR 10-90020 MISC; and CR 10-90029 MISC) is not the equivalent of notifying Japan of the issuance of compulsory process directed at obtaining documents created and normally kept in Japan and the testimony of Japanese nationals in Japan.

DOJ's decision to bypass the accepted procedures deprives Japan of its treaty right to fully consider, and either accept, reject, or apply conditions to the request for documents generated within its borders for use in a United States criminal proceeding.

C. Potential International Consequences

When DOJ seeks to circumvent these established methods in the absence of compelling reasons, there is a two-fold risk: first, other countries may retaliate through the enactment of "blocking statutes" to prevent disclosure[14]; and second, other countries may adopt similarly

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[14] While it is true that "such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute," *Société Nationale v. District Court*, 482 U.S. 522, 544 n.29 (1987) (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U. S. 197, 204-206 (1958)), DOJ has itself accepted, or at least acknowledged, that "[t]here is little that can be done if a foreign corporation, especially one with tenuous contacts with the United States, declines to produce documents." United States Department of Justice, Antitrust Division, *Grand Jury Manual* ("Grand Jury Manual) III.A.2.d.2, available at http://www.justice.gov/atr/ public/guidelines/ 206696.pdf, accessed April 15, 2011.

aggressive policies and practices that may subject Unites States citizens and entities to similar extra-jurisdictional discovery and disclosure requirements.

Other countries, especially civil law countries, generally have markedly different approaches to litigation and discovery than the United States. Broad requests for "all documents referring or relating to" a general subject matter, while typical in the United States, would not be permitted by the laws of major United States trading partners absent a specific showing of the relevance of all of the documents. Hostility to United States discovery practices has been well-documented. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter's note 1 (1987) ("hostility to United States discovery practice reflects dislike of aspects of substantive American law," particularly antitrust law).[15]

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[15] *See also* RESTATEMENT (THIRD) § 437, Reporter's Note 5, p 42: "On the other hand, the degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction."

A perception by a foreign government that the United States utilizes private civil discovery requests under such arrangements as the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention"), March 18, 1970, art. 1, 23 U.S.T. 2555, T.I.A.S. No. 744, which applies only civil and commercial matters, to avoid the limitations of that nation's penal code could work to the detriment of United States prosecutors and, indeed, private American litigants who need access to evidence located abroad.

While the State Department is prepared to transmit requests for document production to Japan, attempts to compel such evidence by means of letters rogatory in civil cases have apparently proven unsuccessful. *See* United States Department of State, Bureau of Consular Affairs - Japan Judicial Assistance, http://travel.state. gov/law/judicial/judicial_678.html#evidoverviewsum (last accessed April 17, 2011).[16]

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[16] Japan is not a party to the Hague Evidence Convention and the only agreement of which we are aware that provides for civil judicial assistance regarding document production is the U.S.-Japan Bilateral Consular Convention of 1963, March 22, 1963, art. 17, 15 U.S.T. 768, which only covers the taking of depositions.

Diminished prospects for Japanese judicial assistance, civil or criminal, as a reaction to overt or covert American circumvention of the U.S.-Japan MLAT or the Cooperation Agreement would be no surprise.

DOJ itself acknowledges that "Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds." United States Department of Justice, Antitrust Division, *Grand Jury Manual* III-11.

DOJ's guidelines relating to foreign evidence recognize the fundamental principle that United States grand jury discovery can have important ramifications in international relations "[b]ecause virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty." United States Attorneys' Manual §§ 9-13.410-9-13.525, available at www.justice.gov/usao/eousa/foia reading room/usarrilindex.html (accessed April 16, 2011); *see also* Criminal Resource Manual § 267 ("[t]he other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather

evidence within its borders as a violation of sovereignty. . . . A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas").

The enactment of "blocking" statutes by other countries frequently has been prompted by United States antitrust litigation.[17] The consequences of such blocking statutes are manifold: parties would be deprived of necessary evidence; litigation would become more expensive and difficult; and relations between nations are strained, often in areas beyond antitrust enforcement. *See* Price, *supra*, note 9, at 327-28.

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[17] *See* R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO WASH. J. INT'L L. & ECON. 315, 315-17 (1995) ("Attempts to enforce aggressive U.S. antitrust laws against anticompetitive behavior abroad have caused some foreign governments to claim that their sovereignty has been violated. To protect this sovereignty from outside incursion, many of these governments enacted blocking statutes to prevent compliance with U.S. discovery orders within their borders.")

The expansive exercise of subpoena power – whether by the United States or by foreign countries – impairs the purpose of MLATs and other diplomatic agreements and might create impediments to international business.

Foreign countries may also adopt expansive methods to obtain evidence that would normally be beyond their jurisdictional reach or that could only be obtained through use of MLAT provisions to seek assistance from the United States.

United States businesses would be subjected to demands for disclosure of information in foreign tribunals whether or not such information is currently available to those tribunals. The hundreds of United States-based firms, in industries or professions from accounting to television and radio broadcasting that do business and have a "presence" in Japan (*see* American Chamber of Commerce in Japan website, available at www.accj.or.jp/user/cm.php. (accessed April 15, 2011) might, as a result of the subpoena of Toshiba's documents, become vulnerable to discovery of their U.S.- located documents and employees, even though those firms have only "tenuous contacts" with Japan (*see* United States Department of Justice, Antitrust Division, *Grand Jury Manual* III-11). Many of these firms are

members of the National Association of Manufacturers.

The Ninth Circuit's *per se* rule enables DOJ to ignore the settled methods for seeking foreign-based discovery, and instead simply to announce an investigation and then exploit the proliferation of civil cases and the broad discovery that it knows will ensue. DOJ will no longer need to notify foreign sovereigns of its intentions and consider their objections. The Ninth Circuit's *per se* rule ignores potential international complications and consequences that might well follow the use of criminal grand jury subpoenas to compel production of foreign company documents and testimony that are not in the United States by reason of the foreign company's will.

As this Court said in *Societe Nationale v. District Court*, 482 U. S. 522, 546 (1987):

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . .When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent

> discovery abuses. . . . In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See Hilton v. Guyot, 159 U. S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

The Ninth Circuit's holding fails utterly to "demonstrate due respect" for foreign litigants or foreign sovereigns.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 20, 2011

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Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should courts be allowed to consider the competing interests of the parties when deciding whether to enforce a federal grand jury subpoena seeking foreign-located materials brought into the United States through compulsory civil process and in reliance on the confidentiality protections granted by a civil protective order?

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INTEREST OF THE AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a nonprofit, public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and related topics. WLF has regularly appeared as *amicus curiae* before this Court and numerous other federal and state courts in cases raising issues of special importance to the business community. *See, e.g., Morrison v. Nat'l Austrl. Bank Ltd.*, 130 S.Ct. 783 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

WLF agrees with Petitioner that the extraordinary per se rule adopted by the Ninth Circuit warrants further review by this Court. The question presented in this case, whether a grand jury subpoena always trumps a civil protective order, involves legal issues of fundamental importance to the business community and the national economy. Most particularly, WLF is concerned that categorically disregarding civil protective orders in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amicus* provided counsel for Respondent with notice of intent to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court.

favor of grand jury subpoenas will burden the relationship between a company and its counsel. The rule also inhibits a company's ability to defend itself in the civil matter in which the protective order was issued by forcing the company's executives to either risk incriminating themselves or broadly assert the Fifth Amendment privilege, leading to adverse inferences in the civil matter.

As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in determining and resolving the issues presented by the Petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Plaintiffs brought the underlying antitrust class action against the makers of flat panel displays after the Department of Justice (DOJ) opened a criminal antitrust investigation into the same conduct. *See* Pet. 5 ("DOJ conceded that its grand jury investigation caused the Class Actions"). The Department of Justice intervened in the civil action to stay discovery while its criminal investigation proceeded. *Id.* at 5-8. DOJ argued for the stay on two grounds: (1) the parties in the civil action might discover information about the criminal investigation and (2) allowing civil discovery to proceed in tandem with the grand jury investigation could put employees of the companies under investigation in the "untenable position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition,

with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter." Pet. App. 4a-5a.

The district court ultimately allowed limited discovery to proceed and entered a protective order strictly limiting the use of any discovery materials to "prosecuting, defending, or attempting to settle *this* [civil] action." *Id.* at 5a (emphasis added). The protective order also allowed DOJ to review certain materials, but it expressly prohibited DOJ's use of civil discovery materials in the grand jury investigation. Pet. 7.

With the protective order in place, the district court compelled the defendants to bring foreign-located evidence into the United States to respond to discovery demands. Pet. App. 12a-13a. (Such evidence is referred to throughout this brief as "foreign discovery materials.") DOJ eventually sought copies of these foreign discovery materials for use in the grand jury investigation. First, DOJ sought to modify the discovery plan to allow it to copy the foreign discovery materials. The district court, with the assistance of a special master, weighed the competing considerations of the DOJ and the civil litigants, who sought to shield the foreign discovery materials from the grand jury. The court ordered the parties to allow DOJ to review the foreign discovery materials, but denied DOJ's request to copy them. *Id.* at 9a-10a. Subsequently, DOJ served a grand jury subpoena on counsel demanding production of the foreign discovery materials, which by that time resided with the defendants' attorneys in the United States. Pet. 11-12.

On a motion to quash the grand jury subpoena, the district court again weighed the competing considerations, and ordered the grand jury subpoena quashed. The court continued to allow the DOJ to review, but not copy, the foreign discovery materials. Pet. App. 4a-7a.

On appeal, the Ninth Circuit was constrained by its per se rule favoring the enforcement of grand jury subpoenas over civil protective orders. (That rule is referred to throughout this brief as the "per se rule.") As a result, the appellate court did not consider the interests of the parties, but instead issued a brief opinion relying on its per se rule to reverse the district court. *Id.* at 1a-3a.

The per se rule is one of three approaches adopted by the courts of appeals in cases where a grand jury subpoena conflicts with a civil protective order. Of the three approaches, only the per se rule prevents judges from fashioning a result after considering the facts in the cases before them. The per se rule requires district courts to always give precedence to grand jury subpoenas over Rule 26(c) protective orders. Other circuits that have decided this issue have given their district courts varying degrees of discretion to consider the circumstances of the case before them when deciding whether it is appropriate to enforce a grand jury subpoena seeking material subject to a civil protective order.

In the Second Circuit, a party is "entitled to rely upon the enforceability of a protective order against any third parties, including the Government."[2] But a protective order may be

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[2] *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296-97 (2nd Cir. 1979).

modified if required by an "extraordinary circumstance or compelling need."[3] *Martindell* expresses a particular concern that judges should be able to use Rule 26(c) protective orders to encourage deponents to provide testimony. According to the Court, witnesses rely on protective orders and they will "frequently...refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." 594 F.2d at 295-96.

In the First Circuit[4] and Third Circuit,[5] there is a presumption in favor of the enforceability of grand jury subpoenas seeking material protected by a civil protective order. The party who faces disclosure can overcome the presumption by demonstrating "exceptional circumstances that clearly favor" honoring the court's commitment to protect the materials. *Roach*, 138 F.3d at 445. According to the First Circuit, the proper course incorporates the "desired flexibility" of the *Martindell* rule and leaves room for "reasoned analysis" of the circumstances at hand. *Id.*

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[3] Id. at 296.

[4] *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998) (holding that a grand jury subpoena trumps a protective order unless the party "seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances").

[5] *In re Grand Jury*, 286 F.3d 153, 165 (3rd Cir. 2002) ("a grand jury subpoena supercedes a protective order unless the party seeking to quash the subpoena can demonstrate exceptional circumstances.")

REASONS FOR GRANTING THE PETITION

Parallel criminal and civil proceedings are a frequent phenomenon whenever the government investigates allegations of misconduct by businesses. Increasingly, criminal antitrust and securities investigations are followed by civil complaints focusing on the same alleged misconduct.[6] This trend is spreading to other areas.[7] Such parallel proceedings are often brought as putative class actions,[8] which increase both the potential discovery costs and the potential damages facing corporate defendants.[9] Corporations seeking to defend

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[6] *See* Pet. App. 6a ("It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery.")

[7] For example, although the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78 dd-1, et seq., provides no private right of action, enterprising plaintiffs have brought shareholder derivative suits based on the same conduct as government FCPA investigations. *See* James G. Tillen & Lauren H. Torbett, *Multiplying the Risks: Parallel Civil Litigation in FCPA Investigations*, 2 Bloomberg L. Rep. – White Collar Crime, No. 10, 2010.

[8] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 681 (1986) (describing the increased trend of plaintiff's attorneys seeking out clients in order to "piggyback on a prior governmental proceeding," such as a federal grand jury investigation into violations of antitrust law); *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1 (2000).

[9] *See Twombly*, 550 U.S. at 558 (discussing the expensive nature of antitrust litigation).

themselves in parallel proceedings are faced with extremely complicated legal issues that require access to sophisticated legal advice. *See, e.g.*, Paul L. Friedman & Craig Alan Wilson, *Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings*, 26 Va. J. Int'l L. 327 (1985) [hereinafter Friedman & Wilson, *Representing Foreign Clients*].

Multinational corporations facing parallel proceedings confront the added complication and expense of having relevant information and evidence overseas.[10] Given the complexity of the legal issues facing multinational corporations defending themselves in parallel proceedings, it is imperative that corporate representatives be able to speak freely with their legal counsel. Legal advice is often needed not only by the corporation, but also by its employees, who may themselves become subjects of the criminal investigation.

WLF believes the per se rule adopted by the Ninth Circuit will chill the relationship between a multinational corporation and its legal advisors when the corporation is facing parallel proceedings. If the corporation alerts its lawyers to foreign-located information that may be relevant to the civil proceeding, the corporation may unwittingly cause that information to come within the jurisdiction of the grand jury. If the corporation does not alert its lawyers regarding such foreign-located information, it will lose the ability to obtain candid legal advice

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[10] *See, e.g.*, Friedman & Wilson, *Representing Foreign Clients, supra*, at 357-79 (discussing the myriad considerations facing lawyers who represent foreign clients, particularly companies, in parallel proceedings involving a grand jury, and analyzing the options of counsel in advising foreign clients about cooperation, candor, and the Fifth Amendment.)

about that information and will limit its counsel's effectiveness in both the civil and criminal proceedings.[11]

Moreover, the per se rule will unfairly limit a corporation's ability to provide discovery in the civil matter. A corporation may want its foreign-based executives to provide testimony in the civil matter, but if such testimony can come within the jurisdiction of the grand jury, foreign-based employees may refuse to provide testimony for fear of criminal jeopardy. *See generally,* Friedman & Wilson, *Representing Foreign Clients, supra,* at 348-57.

Finally, because of the burdens the per se rule places on a multinational corporation's attorney-client relationship, combined with the burdens the rule places on the corporation's ability to provide discovery in the civil case, we believe the rule will pressure corporations to settle cases that lack merit. Such an outcome will only further incentivize plaintiffs to clog the federal courts with increasingly frivolous and far-fetched class action claims.

Yet there is no reason for such an outcome, which is mandated within the Ninth Circuit. Circuit courts of appeals that have addressed the issue have reached different conclusions regarding the enforcement of a grand jury subpoena when faced with a conflicting civil protective order. Pet. 16-23. The approach adopted by the Ninth Circuit -

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[11] *See Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions,* 98 Harv. L. Rev. 1023, 1031-34 (1985) (asserting that parallel proceedings put clients at particular risk of losing the assistance of counsel if materials used by the attorney in the civil action are reachable by the prosecution in the criminal matter).

a per se rule favoring the grand jury subpoena - unnecessarily infringes on the interests of the multinational business community and its employees. Thus, WLF asks the Court to accept the Petition in order to resolve the circuit conflict and give the lower courts guidance on this issue.

ARGUMENT

I. THE PER SE RULE LIMITS THE ABILITY OF MULTINATIONAL BUSINESSES TO DEFEND THEMSELVES IN PARALLEL CIVIL SUITS

Under the Ninth Circuit's rule, when a multinational corporation is compelled to bring foreign-located materials to the U.S. to comply with a civil discovery request, the materials automatically become subject to a grand jury subpoena. Pet. App. 1a. The ability of a multinational business to defend itself in parallel civil and criminal proceedings is severely and unnecessarily limited by such a rule.

(a) The per se rule imposed below unduly burdens the relationship between multinational companies and their counsel

When a multinational corporation is the subject of parallel civil and criminal proceedings in the U.S., it is often true that foreign-located employees, documents, or information may be relevant to the litigation in the U.S. *See* Friedman & Wilson, *Representing Foreign Clients, supra,* at 330-31. Thus, as a threshold matter, such a company generally requires the advice of U.S. counsel on how the foreign-located employees, documents or

information affect the company's defenses in the civil and criminal matters. *See generally id.* (describing the complexity of defending foreign companies in parallel proceedings).

To benefit from the advice of counsel about this foreign-located information, the company must first make its counsel aware of such information. If the corporation discloses to its attorney the existence of foreign-located evidence that may be responsive to civil discovery requests, the attorney may eventually be duty-bound to comply with such requests and produce this foreign-located evidence in the U.S.[12] And if the civil proceeding is underway in a jurisdiction adhering to the per se rule, the foreign-located evidence could then come within the grasp of the grand jury. *See, e.g.*, Pet. App. 1a.

Accordingly, the per se rule creates a dilemma for multinational corporations facing parallel proceedings. If the corporation seeks the advice of counsel regarding foreign-based materials, the client risks putting the information within reach of the grand jury. To avoid this risk, the corporation may feel compelled *not* to provide the information to counsel to prevent it from falling into the hands of the grand jury. Yet, by not providing counsel full access to all relevant information, the company loses the benefit of its lawyer's advice and may jeopardize

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[12] *See, e.g.*, Fed. R. Civ. P. 26(g)(1) (imposing on an attorney a duty to respond to discovery and disclosure requests "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry"). We assume that, as apparently happened in the instant case, the civil plaintiff is able to establish grounds for the court's jurisdiction over the foreign-located evidence.

its defense in both the civil and criminal proceedings.

This Court has long recognized that, unless properly limited, discovery can be used to weaken the attorney-client relationship. For example, a chilling of the attorney-client relationship is precisely the harm that this Court sought to prevent in enunciating the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("[p]roper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.") Likewise, concern over chilling the attorney-client relationship animates the policies of the American Bar Association and the DOJ, discussed *infra*, which seek to sharply limit the circumstances in which document subpoenas can be served on a lawyer.

The per se rule's burdens on the attorney client relationship are apparent in the case below. The companies involved sought the benefit of advice from counsel about foreign-located documents and employees relevant to the matter. When it became apparent that some of that foreign-located information might be implicated by discovery requests in the civil case, counsel took steps to preserve the confidentiality of the information. First, the parties to the civil action sought and obtained a protective order. Pet. at 8. Then, when production of some of the foreign-located evidence was compelled in the civil case, counsel for the foreign defendant took possession of the foreign discovery material to ensure that it would not be disseminated beyond what was required in the civil matter. Pet. 11-12.

Under the discovery plan in the civil matter, the DOJ was able to review, but not copy, the foreign discovery material. Pet. App. 5a. Apparently, DOJ determined that some of the material would be useful to the grand jury investigation. Ordinarily, when DOJ wants to present foreign-located evidence to a grand jury, it uses one of the methods the U.S. has established through treaties with foreign governments for obtaining such information.[13] Yet in this case, DOJ took the extraordinary step of serving counsel with grand jury subpoenas demanding counsel produce the foreign discovery materials.[14]

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[13] Pet. 31-32. Respondent has previously recognized the comity concerns raised by tenuous claims of extra-territorial jurisdiction by U.S. courts. Writing as amicus for the petitioner in *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76 (argued Jan. 11, 2011), the U.S. noted that a U.S. court's attempt to exercise jurisdiction over a foreign company that did not fall within the court's traditional jurisdiction could "be particularly damaging to the United States' foreign trade relations," and create "obvious disincentive for foreign manufacturers to allow their goods to be distributed in the United States." Brief for the United States as Amicus Curiae Supporting Petitioners at 30-31, *Goodyear Luxembourg Tires, S.A. v. Brown*, (No. 10-76) (U.S. filed Nov. 19, 2010), 2010 WL 4735597; *see also Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324, 327 (S.D.N.Y. 1985) (noting that "extraterritorial jurisdiction asserted over foreign interests by the American antitrust laws has long been a sore point with many foreign governments"); *Phila. Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983) (requiring a civil plaintiff to use the Hague Evidence Convention and noting that "the proper exercise of judicial restraint requires that the avenue of first resort...be the Hague Convention.")

[14] It is ironic that DOJ is now seeking civil discovery material for the grand jury investigation since one of the government's initial justifications for intervening in the civil

Both the Department of Justice[15] and the American Bar Association ("ABA")[16] caution against subpoenas directed to counsel. Their reasoning is simple: subpoenas that direct attorneys to disclose and produce materials from their clients' files have a chilling effect on the attorney-client relationship.[17] The government will be particularly tempted to use these disfavored subpoenas in cases like this one, where it is easier for the grand jury to access the materials with a foray into a lawyer's file cabinet than to use other, more appropriate means.

The ABA and the United States Department of Justice have adopted similar policies disfavoring subpoenas directed to attorneys. *See* USA Manual § 9-13.410; Model Rules of Prof'l Conduct R. 3.8(e); Am. Bar. Assoc. 122B. Out of a concern for "potential effects upon an attorney-client relationship," the U.S. Attorney's manual requires the Assistant Attorney General to authorize subpoenas served on attorneys "relating to the attorney's representation of a client." USA Manual §

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matter was to prevent the civil discovery from interfering with the criminal investigation. Pet. App. 4a-5a.

[15] *See* United States Dep't. of Justice, *United States Attorney's Manual* § 9-13.410 (2009) (hereinafter USA Manual § 9-13.410) (requiring that all reasonable attempts to obtain the materials from an alternative source be undertaken before a subpoena is issued to an attorney).

[16] Am. Bar Assoc., 122B, *Criminal Justice Section Report to the House of Delegates: Recommendation* (1987) (hereinafter Am. Bar Assoc. 122B).

[17] Niki Kuckes, *Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of a Prosecutor*, 22 Geo. J. Legal Ethics 463, 490 (2009).

9-13.410(A). Like the ABA rules, the U.S. Attorney's manual instructs Assistant U.S. Attorneys to exhaust "all reasonable attempts" to get the materials from alternative sources. USA Manual § 9-13.410(B).

The justification for these rules, simply stated, is that the attorney-client relationship is "critical to our system of justice," and the likelihood of chilling that relationship is high when the government can compel production of an attorney's files. *See, e.g., United States v. Bergeson*, 425 F.3d 1221, 1226-27 (9th Cir. 2005). Allowing the grand jury to subpoena evidence held by counsel may cause clients to selectively censor their communications with their lawyer about their case, fail to disclose the existence of some materials, and conceal certain documents from their lawyer because the lawyer may later be subpoenaed. *See, e.g., Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions, supra* note 11, at 1031-34.

(b) The Ninth Circuit's per se rule limits a multinational corporation's ability to obtain cooperation from its employees in defending the civil matter

In addition to burdening the relationship between a multinational corporation and its attorney, the per se rule limits a multinational corporation's ability to mount a robust defense in a civil matter with a parallel criminal proceeding. In civil antitrust matters, employees of the corporation are frequently served subpoenas for testimony. In a jurisdiction that uses the per se rule, a civil protective order cannot be relied upon to maintain

the confidentiality of deposition testimony – transcripts of such testimony are subject to subpoena by the grand jury. *See, e.g., In re Grand Jury Proceedings*, 995 F.2d 1013, 1020 (11th Cir. 1993). Thus, foreign-located employees who are outside the jurisdiction of the grand jury may be reluctant to testify in the civil matter.[18] *See* Friedman & Wilson, *Representing Foreign Clients, supra*, at 350-51 (noting the option of foreign witnesses not to comply with domestic civil discovery requests).

A company that needs to include the testimony of its foreign-located employees to properly defend a parallel civil matter will face a Hobson's choice in a per se jurisdiction. If the employee, knowing the transcript of his testimony may be subject to grand jury subpoena, refuses to submit his or her testimony, the corporation may face civil sanctions. *See* Fed. R. Civ. P. 37(b) (providing sanctions for a party that fails to produce a person for examination). If the employee submits to a deposition, the testimony may later be used against either the employee or the corporation in the criminal grand jury proceedings. *See generally United States v. Williams*, 504 U.S. 36, 48-50 (1992)

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[18] While U.S.-based employees may also be reluctant to testify in a civil matter when there is a parallel grand jury investigation, the interests are different. A protective order offers limited protection to a U.S.-based employee who, presumably, is within the jurisdiction of the grand jury. For a foreign-based employee, outside the jurisdiction of the grand jury, the protection provided by a civil protective order could have a much greater impact on the employee's decision to testify in the civil matter.

(describing the broad range of evidentiary materials that can be presented to the grand jury).

But even if the foreign-located employee submits to a deposition, he may feel the need to invoke his Fifth Amendment right against self-incrimination. While this will offer the employee some protection in the criminal investigation, it will leave the corporation with a negative inference in the civil case. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (it is permissible to draw an adverse inference in a civil proceeding against someone who exercises his Fifth Amendment right not to testify in that proceeding.); Pet App. at 5a; *see also* Charles H. Rabon, Jr., Note, *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 Vand. L. Rev. 507 (1989) (describing the inherent unfairness in burdening a defendant with a negative inference when nonparties invoke their Fifth Amendment right).

In jurisdictions that do not apply a per se rule, judges are able to balance the competing interests involved. *See, e.g., Martindell*, 594 F.2d at 296 ("After balancing the interests at stake, we are satisfied that, absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation." (citations omitted)). A foreign-located deponent would still have to weigh the relative merits of testifying in the civil case, but

deponents undoubtedly will be more likely to agree to testify if they know that their testimony is not automatically within a grand jury's reach.

If judges are allowed to weigh crucial factors such as the party's reliance on a protective order when it provided foreign-located evidence in discovery[19] and whether the information sought would ordinarily be within the jurisdiction of the grand jury,[20] defendants and their employees could agree to the depositions of foreign-located witnesses without fear of automatic negative repercussions in the concurrent criminal matter.[21]

(c) The Ninth Circuit's per se rule will lead companies to settle parallel civil cases regardless of the merits of the claims presented

Because the per se rule favoring grand jury subpoenas, when applied to a multinational corporation facing parallel proceedings, burdens the attorney-client relationship and makes it difficult to defend the civil matter, it creates a perverse incentive for such corporations to settle the civil

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[19] *See* Pet. App. at 11a-15a (considering the reliance on the part of the defendants in this case on the protective order).

[20] *See id.* (noting that DOJ should not be allowed to "overstep its power" in the instant matter).

[21] Even in jurisdictions that do not adhere to the per se rule, foreign-located employees may still be reluctant to testify in the civil matter. Presumably, though, as the likelihood of an employee's testimony being subject to grand jury subpoena decreases, the likelihood that the employee will agree to testify increases. Thus, the rule in *Martindell* would provide the greatest freedom for corporations to defend themselves with the testimony of their employees.

matter, no matter what.[22] As Petitioner points out, the incentives to settle in a per se jurisdiction often exist regardless of the merits, or lack thereof, of the civil cause of action.[23]

If plaintiffs are allowed to use the enormous leverage provided by the per se rule to obtain "in terrorem" settlements from companies, the already voluminous civil docket of parallel civil cases filed following the announcement of a grand jury investigation is bound to explode.[24] The dockets of U.S. federal courts should not be clogged by meritless causes of action that use the per se rule as

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[22] The burden placed on the attorney-client relationship by the per se rule is likely to have other consequences as well. For example, district courts in per se jurisdictions, cognizant of the rule's chilling effect on the attorney-client relationship, may be reluctant to enforce discovery of foreign-located evidence to which civil plaintiffs would otherwise be entitled. Such a result will lead to uneven enforcement of the Federal Rules of Civil Procedure across the country and will give civil plaintiffs another incentive to forum shop. Plaintiffs hoping to discover foreign-located evidence will find ways to establish venue in jurisdictions that do not adhere to the per se rule.

[23] "As this Court has observed, such collateral consequences of broad civil discovery can cause defendants 'to settle even anemic cases,'" Pet. at 27 (citing *Twombly*, 550 U.S. at 559).

[24] *Cf.* Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 Law & Soc'y Rev. 237, 247-48 (1992) (drawing conclusions regarding the role of class actions in the federal legal system by observing class actions in the Northern District of California over a seven year period, and noting that entrepreneurial plaintiffs' lawyers spring into action when they discover a grand jury investigation.)

leverage to obtain a windfall from a corporate defendant.[25]

II. LESS BURDENSOME ALTERNATIVES TO THE PER SE RULE EXIST IN OTHER CIRCUITS

When a grand jury issues a subpoena for material covered by a Rule 26(c) protective order, only the per se rule burdens multinational businesses in the ways described above. As other courts have recognized, although the grand jury vindicates an important law enforcement interest by ensuring the efficacy of its subpoena power,[26] the civil justice system also has a strong interest in the durability of Rule 26(c) protective orders.[27] When these interests collide, the rules adopted in the other circuits offer less burdensome alternatives to the per se rule.[28]

The Second Circuit was the first court of appeal to decide this issue. In *Martindell*, the Court held that materials produced under civil protective order are generally shielded from the government,

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[25] *See id.* at 268. (noting that follow-on lawsuits "tend to settle...with only a superficial investigation into the merits" and do not contribute to "any deepening of an inquiry...beyond what was known when the cases were filed.")

[26] *See Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

[27] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

[28] The inconsistent application of Fed. R. Civ. P. 26(c) by different circuit courts of appeal is itself troubling. This court has previously recognized that "one of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts..." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation and internal quotation marks omitted).

unless the government can prove "improvidence in the grant of a Rule 26(c) protective order," "some extraordinary circumstance," or "compelling need." 594 F.2d at 296.

The next three Circuits to consider the question -- the Fourth, the Eleventh and the Ninth Circuits -- all adopted a per se rule favoring enforcement of grand jury subpoenas. The Fourth Circuit announced its per se rule in *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988). In 1993, the Eleventh Circuit also adopted the per se approach, *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1015-20 (11th Cir. 1993), with the Ninth Circuit following suit two years later. *In re Grand Jury Subpoena (Meserve)*, 62 F.3d 1222, 1226 (9th Cir. 1995).

Circuits courts that have considered the question more recently have all declined to adopt a per se rule favoring grand jury subpoenas over civil protective orders. The First and Third Circuits developed a hybrid approach combining aspects of the *Martindell* approach with the per se rule. *Roach*, 138 F.3d at 445-6; *In re Grand Jury*, 286 F.3d at 159-64. These circuits developed approaches allowing judges to consider the interests in the case at hand before deciding whether to enforce a grand jury subpoena for materials shielded by a protective order.[29]

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[29] In the Third Circuit, before the government can obtain an order enforcing a grand jury subpoena, it must demonstrate the propriety of the subpoena, including whether each item sought is within the grand jury's jurisdiction. *See In re Grand Jury Proceedings* (*Schofield*), 486 F.2d 85, 93 (3rd Cir. 1973).

The Tenth Circuit also made clear recently that it would not automatically give the government access to material shielded by a civil protective order. *SEC v. Merrill Scott & Assoc., Ltd.*, 600 F.3d 1262, 1270-75 (10th Cir. 2010). The Court held that although DOJ was generally permitted to provide the Internal Revenue Service access to documents under information-sharing statutes, the Rule 26(c) protective order shielded the information in question. *Id.* at 1273. The Court noted that because of the government's "vast investigatorial resources and power for oppression" courts in the Tenth Circuit have typically required a "greater showing" of "unusual circumstances, or even extraordinary circumstances" when the government seeks to access documents covered by a protective order. 600 F.3d at 1272-73.

Thus, as the case law from other jurisdictions demonstrates, the important law enforcement objectives of the grand jury can be preserved while also ensuring that the interests of civil litigants embodied in protective order are not ignored. While it is true that a per se rule provides certainty, if achieving certainty requires a diminution of both the attorney-client relationship and a company's ability to defend itself, then the cost of certainty is too high. Given the important competing interests at stake when a grand jury issues a subpoena for material covered by a Rule 26(c) protective order, and given the conflict among the circuits, we urge the Court to take this case in order to resolve the conflict and provide guidance to the lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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